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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~705.~~ 148

[redacted]HENRIETTA HOFFMAN, APPELLANT,

VS.

THE JOHN HANCOCK MUTUAL LIFE-INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED FEBRUARY 12, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 705.

HENRIETTA HOFFMAN, APPELLANT,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 January term, A. D. 1873.

At a stated term of the circuit court of the United States for the sixth circuit and northern district of Ohio, begun and held at Cleveland, in said district, on the first Tuesday of January, being the seventh day of that month, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh—present, the honorable Charles T. Sherman, district judge—among the proceedings then and there had were the following, to wit:

HENRIETTA HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Co. of Boston. } No. 2312. In chancery.

Be it remembered that heretofore, to wit, on the 2d day of January, A. D. 1872, came the defendant, by its solicitors, and filed herein the following transcript of proceedings in the court of common pleas of Cuyahoga County, Ohio, which is in the words and figures following, to wit:

TRANSCRIPT.

THE STATE OF OHIO, *Cuyahoga County, ss:*

In the court of common pleas, 38102.

2 HENRIETTA HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Co. of Boston. } Civil action for money and relief. No. 1402.

Be it remembered that heretofore, to wit, at a term of the court of common pleas, begun and held at the court-house in the city of Cleveland, within and for the county of Cuyahoga and State of Ohio, on the 6th day of November, in the year of our Lord one thousand eight hundred and seventy-one, by and before their Honors Horace Foote, Samuel B. Prentiss and Robert F. Paine, judges of the court of common pleas of the fourth judicial district of the State of Ohio, there was duly filed in said court (on November 25, 1871, being a day in said term) a certain petition in this cause, in the words and figures following, to wit:

THE STATE OF OHIO, *Cuyahoga County, ss:*

In the court of common pleas.

HENRIETTA HOFFMAN, PLAINTIFF,
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company of Boston, defendant.

Petition.

The plaintiff, Henrietta Hoffman, complaining of the defendant, The John Hancock Mutual Life Insurance Company of Boston, a corporation organized under and by virtue of the laws of the State of Massachu-

setts, and doing business in Ohio, in conformity to the laws of Ohio,
3 for that the plaintiff on the 7th day of August, A. D. 1869, was interested in the life of her husband, Frederick Hoffman, then being in good health, and residing in the city of Cleveland and State aforesaid, to the amount of eight (8,000) thousand dollars and more, and so continued interested until the death of her said husband as hereinafter set forth. And the said defendant, The John Hancock Mutual Life Insurance Company of Boston, on the same day, through one Justin E. Thayer, who was the general agent for said company in Ohio, duly appointed and acting as such, with full authority to appoint subagents and to represent said company in all matters of insurance, and who in pursuance of his instructions from said company received all moneys collected on insurance by said company in Ohio, and deposited the same in his own private name and account, but under the direction of said company he accounted to and with them on monthly statements for the amount of his receipts, less his commissions, in company with one A. C. Goodwin, a subagent of said company, duly appointed by said Justin E. Thayer, gen'l agent as aforesaid, solicited an insurance of eight thousand dollars on the life of said Frederick Hoffman,
4 and the said Hoffman declined to make an application, for the reason, as he said, he had not the means of paying the premiums. That said Thayer thereupon volunteered to provide for the cash portion of the premium himself, and to take of said Frederick Hoffman property to compensate him for such provision, if they could agree upon the property and the price thereof, or he would take his note on short time for a part or the whole that he should thus provide for. That Hoffman, induced by the offers thus made him by said general agent, agreed to make an application for a policy on his life of $8,000 from said company, providing said Thayer would assume the payment of the premiums, and would give him time on a portion of the amount assumed, and would take property for the balance of the premium thus assumed by him, which was agreed to by and between said Thayer and said Hoffman. That upon said 7th day of August, A. D. 1869, said general agent sent his subagent, said A. C. Goodwin, to complete the arrangements with said Hoffman, and to select the property; that thereupon said Frederick Hoffman made an application to said defendant through said general agency, for a policy of insurance on his life of $8,000, on the ten-year plan, so called, for the benefit of this plaintiff, and thereupon said
5 general agent, Justin E. Thayer, assumed the payment of the premium in hand of $553.00 to said company, should said application be accepted by said company and a policy be issued thereon, and the said Hoffman turned over to the said agent under said agreement one horse, at the price of $400, a note running 60 days of $100.00 which at maturity was paid, and also canceled a due-bill which he held against said Goodwin for the sum of $53.00, and for the deferred portion of the premium he executed a note which they called a premium note, and gave to said agent, and thereupon said Goodwin, acting in behalf of said general agent Thayer, and by his directions, gave said Hoffman a receipt of which the following is a copy:

Conditional receipt.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Cleveland, Aug. 7, 1869.

Received of Frederick Hoffman the sum of nine hundred and twenty-two dollars and fifty-seven cents, being the first annual premium on an

insurance of eight thousand dollars on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company of Boston. The said insurance to date from Aug. 7th, 1869, subject to the conditions and agreements of the
6 policies of said company, and provided that the said application shall be accepted by the said company and a policy be by them granted thereon. The said policy, if issued, to be delivered by me when received to the holder of this receipt, which shall then be given up.

It is expressly agreed and understood that if the above-mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt, but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up.

A. C. GOODWIN, *Agent.*

[2 c. rev. stamp.]

And thereby said defendant, The John Hancock Mutual Life Insurance Company of Boston, on the 7th day of August, A. D. 1869, agreed with the said Frederick Hoffman, for the benefit of this plaintiff, to issue a policy of insurance to her upon the life of her said husband, the said Frederick Hoffman, and thereby to insure his life for the benefit of this plaintiff, in the sum of $8,000, upon condition that the application by him made should be accepted by said defendant, and should it not be accepted by said defendant, then said defendant agreed to return said premium to said Hoffman.

And plaintiff says that the said general agent, Justin E. Thayer, forwarded said application to defendant, and the same was by de-
7 fendant received, and a policy for the sum of $8,000 was by defendant issued thereon for the benefit of plaintiff and forwarded to said Justin E. Thayer, at Cleveland, Ohio, which was by him received for this plaintiff and duly countersigned for delivery. And plaintiff further says that said Justin E. Thayer accounted with the said defendant for the premium on said policy so as aforesaid assumed by him, and by said defendant he was allowed his commission thereon. That the said A. C. Goodwin, as subagent of said company, was also accounted with for his commissions on said policy, and paid the same.

And plaintiff further says that the said Frederick Hoffman performed everything on his part to be done and performed to entitle plaintiff to said policy and the insurance effected thereby. And during the life-time of the said Frederick Hoffman he at all times was ready to receive said policy, and to do and perform all things on his part to be done and performed to entitle her to a continuance of said policy and of the insurance created thereby and therein, by which the same should be kept alive and in force. And that this plaintiff also has ever been ready to do and perform all things under said policy to be done and performed to entitle her to a continuance of the insurance thus effected on
8 the life of her said husband.

And plaintiff further says that although she was entitled to said policy, yet the said Justin E. Thayer fraudulently withheld the same from her and would not deliver it, although often requested so to do. And although the said Frederick Hoffman had fully paid the said agent according to his contract for said agent's assumption and payment of the premium on said policy, yet he refused to hand over said policy to this plaintiff or to the said Frederick for the benefit of this plaintiff, and refused to return said premium or any part thereof to said Frederick or this plaintiff, and he still refuses, although often requested; and no part

of said premium has been returned to plaintiff, nor was it at any time returned to said Frederick Hoffman.

Plaintiff further says she is unable to set up a copy of said policy, for the reason it has never come into her possession. But she is informed, and so states the fact to be, that by the terms of said policy the said defendant agreed to pay to this plaintiff, or her legal representatives, the sum of $8,000, within ninety days after the proof of the decease of the said Frederick Hoffman.

And plaintiff further says that on the 3d day of February, A. D.
9 1871, the said Frederick Hoffman deceased, which death was caused by his being thrown from a buggy in the city of Cleveland, county of Cuyahoga and State of Ohio, and was not caused by reason of his employment as an engineer or fireman in charge of a steam-engine, or as conductor or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, or in the manufacture, sale, or transportation of gun-cotton or nitro-glycerine, or in any occupation or employment forbidden by the terms of said policy, and his death was not caused by reason of his becoming so far intemperate as to impair his health; nor did he die by his own hand, or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the State or the United States, but his death was wholly accidental, and was caused by his being thrown from a buggy as before stated.

And the plaintiff further states that on the day of A. D. 1871, she caused necessary proof of the death of said Frederick Hoffman, being the affidavits of herself and of one acquainted with her, as to her being the party mentioned in the policy as payee, and the affida-
vit of the physician who attended her said husband after his
10 injury to his death, as to his death; and of the undertaker who buried him, as to the burial, to be forwarded to The John Hancock Mutual Life Insurance Company of Boston, at their home office in the city of Boston, and State of Massachusetts, and accompanied said proofs with a demand for the payment of said sum of $8,000, being the amount of said policy, all of which proofs were received by said defendant. Yet, though requested, and though 90 days and more have fully expired since said notice of death, and the proofs thereof were forwarded to said defendant, and by defendant received, and since said demand was made, the said defendants have not paid the said sum of $8,000 or any part thereof, though often requested so to do.

And the plaintiff says that by reason of the arrangement entered into between her husband, the said Frederick Hoffman, and the said Justin E. Thayer, general agent of said company in Ohio, and the subsequent acceptance by said company of his application, and the issuing of a policy thereon, and by reason of said agent's accounting with said company for the premium thereon, she became entitled to receive said policy of
insurance, and the life of her husband was thereby insured for her
11 benefit by said company in the sum of $8,000, and that the refusal of said company to deliver said policy to her, or to her said husband for her benefit, was and is a fraud upon her on the part of said company.

And she further says that the said Frederick Hoffman, during his lifetime, having ever been ready to receive said policy for her, and to pay all sums required of him under said policy, which might thereafter become due and payable on account of said policy, thereby she was entitled to have said policy continue in full force to the time of the death of her said husband, and now is entitled to receive from said

defendant the amount of insurance granted by said policy, to wit, the sum of $8,000, less the sums which should have been paid by her said husband to said company.

Wherefore plaintiff asks that the said John Hancock Mutual Life Insurance Company of Boston may be notified of the filing of this petition, according to law, that they appear and answer, setting forth the application of said Frederick Hoffman, and the policy which was by them issued upon said application; and that, on final hearing, the court will find the plaintiff to be entitled to said policy, and that
12 the same was in force during the life of her said husband, and that the same is now due and payable from said defendant to this plaintiff, and that the court will order an account to be taken of the amount *to be taken of the amount* due thereon, and render a judgment in her favor for the sum of $8,000, accordingly, and for such other and further relief as in the premises may comport with equity.

By ELWELL & MARVIN &
B. R. BEAVIS,
Pl'ff's Att'ys.

Henrietta Hoffman, plaintiff, being duly sworn, deposes and says that all the several matters and things which are stated in the foregoing petition as from the information of others she believes to be true; and that all the several other matters and things therein set forth are true in substance and in fact.

HENRIETTA HOFFMAN.

Subscribed in my presence and sworn to before me this 18th day of November, A. D. 1871.

ULRIC H. BIRNEY,
[SEAL.] *Notary Public.*

STATE OF OHIO, *Cuyahoga County, ss :*

In the court of common pleas.

HENRIETTA HOFFMAN, PL'FF,
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company of Boston, defendant.

Precipe.

To the clerk:

Issue summons on the above to the general agent of the com-
13 pany at Cleveland, O., (Standard,) returnable according to law. Action for money & relief. Amount claimed, $8,000.00.

ELWELL & MARVIN,
B. R. BEAVIS,
Pl'ff's Att'ys.

Said petition was endorsed as follows, to wit: "Henrietta Hoffman vs. The John Hancock Mutual Life Insurance Company of Boston, petition for relief & money. Ellwell & Marvin, B. R. Beavis, pl'ff's att'ys."

And thereupon was duly issued a certain summons in this cause, in the words and figures following, to wit:

Summons.

THE STATE OF OHIO,
Cuyahoga County, ss:

To the sheriff of Cuyahoga County:

You are commanded to notify The John Hancock Mutual Life Insurance Company of Boston that it has been sued by Henrietta Hoffman in the court of common pleas of Cuyahoga County, and that unless it answer by the 23d day of December, A. D. 1871, the petition of the said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 4th day of Dec., A. D. 1871.

Witness Frederick S. Smith, clerk of said court, and the seal
14 thereof, at the city of Cleveland, this 25th day of November, A. D. 1871.

[SEAL.] FREDERICK S. SMITH, *Clerk*,
By H. CLAY WHITE, *Deputy*.

Said summons was endorsed as follows, to wit: "Cuyahoga common pleas, Henrietta Hoffman vs. The John Hancock Mutual Life Insurance Company. Summons in action for money and relief. Amount claimed, $8,000. Returnable Dec. 4, 1871. Elwell & Marvin, plaintiff's attorneys."

And thereupon, on the 4th day of December, A. D. 1871, being also a day in said term, came the sheriff of said county and duly returned said summons so directed to him, with his return thereon endorsed as follows, to wit:

Return.

Rec'd Nov. 25, 1871—3 p. m.

JOHN N. FRAZEE, *Sheriff*.

THE STATE OF OHIO,
Cuyahoga County, ss:

On the 2nd day of December, A. D. 1871, I served this summons by delivering a true and certified copy thereof to J. P. Stanard, agent for said county of The John Hancock Mutual Life Insurance Company, for said company, said company's principal office being located out of the State of Ohio, and no office of said company being found in my county.

JOHN N. FRAZEE, *Sheriff*,
By GEORGE RIDGEWAY, *Deputy*.

Sheriff's fees, $1.50.

15 And thereupon, on the 16th day of December, A. D. 1871, being also a day in said term, was duly filed in said court a certain petition for removal in this cause, in the words and figures following, to wit:

Petition for removal.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the court of common pleas.

HENRIETTA HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company. } Petition for removal.

And now comes the said defendant, The John Hancock Mutual Life Insurance Company, and at this, its first appearance herein, respectfully

represents that at the time the summons in this action was served upon it it was, ever since has been, and now is, a corporation foreign to the State of Ohio, created and existing under and by virtue of the laws of the State of Massachusetts, and at each and all of said times was and now is a citizen of the State of Massachusetts, and not of the State of Ohio, and that at each and all of said times the said Henrietta Hoffman was and now is a citizen of the State of Ohio.

Your petitioner further represents that the matters in dispute in this action between the said Henrietta Hoffman and your petitioner exceeds in value the sum of five hundred dollars, exclusive of costs, as
16 appears from the summons herein, and also from the petition filed herein by the said Henrietta Hoffman.

Your petitioner therefore prays that the said suit may be removed for trial into the next circuit court of the United States, within and for the northern district of Ohio, according to the act of Congress in such case made and provided, and your petitioner now offers George Willey and John E. Cary as its sureties for entering in said circuit court on the first day of its next session copies of the process against it, and also for its there appearing according to law.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,
By WILLEY, CARY & TERRELL, *its Attorneys.*

THE STATE OF OHIO,
Cuyahoga County, ss:

H. L. Terrell, being duly sworn, says that he is one of the attorneys for the petitioner, which is a foreign corporation, and that the facts set forth, and allegations in the foregoing petition, are true as he verily believes.

H. L. TERRELL.

Sworn to before me by said H. L. Terrell, and by him subscribed in my presence this 15th day of December, A. D. 1871.

[SEAL.] CHARLES H. ROBINSON,
Notary Public.

17 Said petition was endorsed as follows, to wit: "Com. pleas court for Cuyahoga County, O. Henrietta Hoffman vs. The John Hancock Mutual Life Ins. Co. Petition for removal. W. C. & T. for pet'r."

And thereupon, on the said 16th day of December, A. D. 1871, was also duly filed in said court a certain bond for removal in this cause, in the words and figures following to wit:

Bond.

Know all men by these presents that we, The John Hancock Mutual Life Insurance Company of Boston, Massachusetts, George Willey and John E. Cary, are held and firmly bound unto Henrietta Hoffman in the penal sum of one thousand dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is such that the said John Hancock Mutual Life Insurance Company hath this day applied to the court of common pleas within and for the county of Cuayahoga, and State of Ohio, to remove into the circuit court of the United States for the north-

ern district of Ohio a certain suit now pending in said court of common pleas, wherein the said Henrietta Hoffman is plaintiff and the said John Hancock Life Insurance Company is defendant.

18 Now, if the said John Hancock Mutual Life Insurance Company shall enter in said circuit court on the first day of its next session copies of the process against it in said suit so pending as aforesaid in such court of common pleas, and shall also there appear according to the act of Congress in such case made and provided, then this obligation shall be void; otherwise to be and remain in full force and virtue in law. Witness our hands and seals this 16th day of December, A. D. 1871.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY. [SEAL.]
By JOHN E. CARY, *Att'y.*
G. WILLEY. [SEAL.]
JOHN E. CARY. [SEAL.]

And now comes the said The John Hancock Mutual Life Insurance Company of Boston, and files its petition for the removal of this cause to the next circuit court of the United States within and for the northern district of Ohio. And the same having been heard and considered, and the court being satisfied of the truth of the facts therein stated, and said John Hancock Mutual Life Insurance Company of Boston offering George Willey & John E. Cary as its sureties in the sum of

19 $1,000, for entering in said circuit court on the first day *day* of its next session copies of the process against it, and also for its there appearing according to law, which sureties are accepted by the court: It is therefore ordered that said Henrietta Hoffman do no further prosecute her suit in this court; and that the same be removed into the said circuit court, according to the act of Congress in such case made and provided. The plaintiff's costs in this cause are taxed at $495, and the defendant's costs at $13.70.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Frederick S. Smith, clerk of the court of common pleas within and for said county, and in whose custody the files, journals, execution-dockets, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the record of the proceedings of the court of common pleas within and for said Cuyahoga County, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript thereof, and that the foregoing copy contains true copies of the pleadings and process in said cause.

20 In testimony whereof I do hereto subscribe my name officially, and affix the seal of said court, at the court-house in the city of Cleveland, in said county, this 27th day of December, A. D. 1871.

[SEAL.] FREDERICK S. SMITH, *Clerk.*

And afterward, to wit, on the 12th day of January, A. D. 1872, came the complainant herein, by her solicitors, and filed in the clerk's office of said circuit court her bill of complaint, which is in the words and figures following, to wit:

Bill of complaint.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

HENRIETTA HOFFMAN
against
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company of Boston.

To the judges of the circuit court of the United States for the northern district of Ohio:

Henrietta Hoffman, a resident of the city of Cleveland, the county of Cuyahoga, and State of Ohio, which is also of the northern district of Ohio, and within the jurisdiction of this honorable court, brings this her bill against the said John Hancock Mutual Life Insurance Company of Boston, a corporation organized under and by virtue of the
21 laws of the State of Massachusetts, and doing business in Ohio under and by virtue of the laws of Ohio relating to foreign insurance companies, and being a resident of the State of Massachusetts.

And thereupon your orator complains and says, that your orator, on the 7th day of August, A. D. 1869, was interested in the life of her husband, Frederick Hoffman, then being in good health and residing in the city of Cleveland, and State aforesaid, to the amount of eight ($8,000) thousand dollars and more, and so continued until the death of her said husband as hereinafter set forth.

And the said respondent, the John Hancock Mutual Life Insurance Company of Boston, on the same day, through one Justin E. Thayer, who was the general agent for said company in Ohio, duly appointed and acting as such, with full authority from said John Hancock Mutual Life Insurance Company of Boston, and by said company duly authorized to appoint subagents, and to represent said company in all matters of insurance, and who, in pursuance of his instructions from said company, received all moneys collected from insurance by said company in Ohio, and deposited the same in his own personal name and account, but under the direction of said company he accounted to and with
22 them on monthly statements for the amount of his receipts, less his commissions, in company with one A. C. Goodwin, a subagent of said company, duly appointed by said Justin E. Thayer, general agent, under and by virtue of the authority thus reposed in him, as aforesaid, solicited an insurance of eight thousand dollars on the life of said Frederick Hoffman, and the said Hoffman declined to make an application, for the reason, as he said, he had not the means of paying the premiums. That said Thayer thereupon volunteered to provide for the cash portion of the premium himself, and to take of said Frederick Hoffman property to compensate him for such provision, if they could agree upon the property and the price thereof, or he would take his note on short time for a part or the whole that he should thus provide for. That Hoffman, induced by the offers thus made him by the said general agent, agreed to make an application for a policy on his life of ($8,000) eight thousand dollars from said company, providing said Thayer would assume the payment of the premiums, and would give him time on a portion of the amount assumed, and would take property for the balance of the premiums thus assumed by him, which was agreed to by and between said Thayer and said Hoffman.

23 That upon said 7th day of August, A. D. 1869, said general

agent sent his subagent, said A. C. Goodwin, to complete the arrangements with said Hoffman, and to select the property. That thereupon said Frederick Hoffman made an application to said respondent, through said general agent, for a policy of insurance on his life of $8,000 on the ten year plan, so called, for the benefit of this orator. And thereupon said general agent, Justin E. Thayer, assumed the payment of the premium in hand, of $553, to said company, should said application be assumed by said company, and a policy be issued thereon. And the said Hoffman turned over to said agent, under said agreement, one horse, at the price of $400; a note, running 60 days, of $100, which at maturity he paid, and he also cancelled a due bill which he held against said Goodwin for the sum of $53, and for the deferred portion of the premium he executed a note which they called a premium-note, and gave it to said agent. And thereupon said Goodwin, acting in behalf of said general agent, Thayer, and by his directions, gave said Hoffman a receipt, of which the following is a copy:

Conditional receipt.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Cleveland, August 7th, 1869.

24 Received of Frederick Hoffman the sum of nine hundred and twenty-two dollars and fifty-seven cents, being the first annual premium on an insurance of eight thousand dollars on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company of Boston; the said insurance to date from August 7th, 1869, subject to the conditions and agreements of the policies of the said company, and provided that the said application shall be accepted by the said company, and a policy by them granted thereon. The said policy, if issued, to be delivered by me when received to the holder of this receipt, which shall then be given up.

It is expressly agreed and understood that if the above-mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt, but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up.

A. C. GOODWIN, *Agent.*

[2 c. U. S. rev. stamp canceled.]

And thereupon the said respondent, the John Hancock Mutual Life Insurance Company of Boston, on the 7th day of August, A. D. 1869, agreed with the said Frederick Hoffman, for the benefit of this orator, to
25 issue a policy of insurance to her upon the life of her said husband, the said Frederick Hoffman, and thereby to insure his life for the benefit of this orator in the sum of $8,000, upon condition that the application by him made should be accepted by said respondent, and should it not be accepted by respondent, then said respondent agreed to return said premium to said Hoffman. And this orator says that the said general agent, Justin E. Thayer, forwarded said application to respondent, and the same was, by respondent, received and accepted, and a policy for the sum of $8,000 was, by respondent, issued thereon for the benefit of orator, and forwarded to said Justin E. Thayer, at Cleveland, Ohio, which was, by him, received for this orator, and duly countersigned for delivery. And orator further says that said Justin E. Thayer accounted with the said respondent for the premium on said policy so as aforesaid assumed by him, and, by said respondent, he was

allowed his commission thereon. That the said A. C. Goodwin, as sub-agent of said company, was also accounted with for his commissions on said policy, and was paid the same.

And orator further says that the said Frederick Hoffman performed everything on his part to be done and performed to entitle orator
26 to said policy and the insurance effected thereby. And, during the life-time of the said Frederick Hoffman, he, at all times, was ready to receive said policy, and to do and perform all things on his part to be done and performed to entitle her to a continuance of the said policy and to the insurance thereby and therein created, by which the same should be kept alive and in force. And that this orator also has been ever ready to do and perform all things under said policy to be done and performed to entitle her to a continuance of the insurance thus effected on the life of her said husband. And orator further says that, although she was entitled to said policy, yet the said Justin E. Thayer fraudulently withheld the same from her, and would not deliver it, although often requested so to do. And although the said Frederick Hoffman had fully paid said agent according to his contract for said agent's assumption of and payment of the premium on said policy, yet he refused to hand over said policy to this orator, or to the said Frederick for the benefit of this orator, and refused to return said premium, or any part thereof, to said Frederick or this orator, and he still refuses, although often requested; and no part of said premium has been
27 returned to orator, nor was it, at any time, returned to said Frederick Hoffman. Orator further says she is unable to set up a copy of said policy, for the reason it has never come into her possession. But she is informed, and so states the fact to be, that, by the terms of said policy, the said defendant agreed to pay to this orator or her legal representatives the sum of $8,000 within 90 days after the proof of the decease of said Frederick Hoffman.

And this orator further says that, on the 3d day of February, A. D. 1871, the said Frederick Hoffman, deceased, which death was caused by his being thrown from a buggy, in the city of Cleveland, and county of Cuyahoga, and State of Ohio, and was not caused by reason of his employment as an engineer or fireman in charge of a steam-engine, or as conductor or brakesman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, gun-cotton, or nitro-glycerine, or in any occupation or employment forbidden by the terms of said policy; and his death was not caused by reason of his becoming so far intemperate as to impair his health; nor did he die by his own hand, or in a duel, or in consequence thereof; or by the hands of justice; or in the known violation of
28 any law of the States or the United States; but his death was wholly accidental, and was caused by his being thrown from a buggy as before stated. And orator further says that, on the 10th day of March, A. D. 1871, she caused necessary proof of the death of said Frederick Hoffman, being the affidavits of herself and of one acquainted with her, as to her being the party mentioned in the policy as payee, and the affidavits of the physician who attended her said husband after his injury to his death, as to his death, and of the undertaker who buried him, as to the burial, being the usual and customary proofs, to be forwarded to the said John Hancock Mutual Life-Insurance Company of Boston, at their home office in the city of Boston, and State of Massachusetts, and accompanied said proofs with a demand for the payment of said sum of $8,000, being the amount of said policy, all of which were received by said respondent. Yet, though requested, and

though more than 90 days have fully expired since said notice of death and the proofs thereof were forwarded to said respondent, and by said respondent received, and since said demand was made, the said respondent has not paid the said sum of $8,000, or any part thereof,
29 though often requested so to do. And orator says that, by reason of the arrangement entered into between her husband, the said Frederick Hoffman, and the said Justin E. Thayer, general agent of said company in Ohio, and the subsequent acceptance by said company of his application and the issuing of a policy thereon, and by reason of said agent's accounting with said company for the premium thereon, she became entitled to receive said policy of insurance, and the life of her said husband was thereby insured for her benefit by said company in the sum of $8,000; and that the refusal of said company to deliver the said policy to her or to her said husband for her benefit was and is a fraud upon her upon the part of said company. And she further says that the said Frederick Hoffman during his life-time, having been ever ready to receive said policy for her, and to pay all sums required of him under said policy, which might thereafter become due and payable on account of said policy; thereby she was entitled to have said policy continued in full force to the time of the death of her said husband; and now is entitled to recover from said respondent the amount of insurance granted by said policy, to wit, the sum of $8,000, and dividends accruing thereon, less the sums which should have been
30 paid by her said husband to said company.

Wherefore orator prays that the said John Hancock Mutual Life-Insurance Company of Boston may be notified of the filing of this bill according to law; that they appear and answer under oath, setting forth the application of the said Frederick Hoffman, and the policy which was by them issued upon said application, and the amount of dividends which would have accrued thereon; and that on final hearing, your honors may find your orator to be entitled to said policy, and that the same was in force during the life-time of her said husband, and that the same is now due and payable from said respondent to this orator; and that the court will order an account to be taken of the amount due thereon, and render a judgment in her favor accordingly; and for such other and further relief as in the premises may comport with equity.

By ELWELL & MARVIN,
Solicitors.

Henrietta Hoffman, orator, being duly sworn, deposes and says that all the several matters and things which are stated in the foregoing bill as from the information of others she believes to be true, and that all the several other matters and things therein set forth are true
31 in substance and in fact.

HENRIETTA HOFFMAN.

Subscribed in my presence and sworn to before me this 11th day of January, A. D. 1872.

[SEAL.] ULRIC H. BIRNEY,
Notary Public.

And afterward, to wit, on the 6th day of April, A. D. 1872, there was filed herein a certain answer by said respondent, which is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the northern district of Ohio, in equity.

HENRIETTA HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE-INSURANCE Company of Boston. } Answer.

The respondent, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill contained, for answer thereto, or unto so much and such parts thereof as this respondent is advised is or are material or necessary for it to make answer unto, this respondent, for answering, saith:

That it denies that, through itself or any of its agents, it ever solicited insurance on the life of the said Frederick Hoffman, in any sum or amount, or in any manner whatever. That it denies that said Justin E. Thayer was its general agent for the State of Ohio, or that
32 he had any authority to appoint subagents to represent this respondent, or that he had authority to represent this respondent in all matters of insurance. That it denies that said A. C. Goodwin was the agent of this respondent for any purpose whatever. That it denies that the said Justin E. Thayer ever at any time undertook, promised, or agreed to provide for the cash portion of any premium for any insurance to be taken by said Frederick Hoffman in this respondent, and alleges that said Justin E. Thayer had no authority to bind this respondent by any such agreement or undertaking.

That it admits that said Frederick Hoffman made an application to this respondent for a policy of $8,000 upon his life, but denies that said Justin E. Thayer agreed to assume the payment of the premium therefor, or any part thereof, and denies that said A. C. Goodwin was the agent of, or in any way represented, this respondent or said Justin E. Thayer in any transactions or negotiations he may have had with said Frederick Hoffman in relation to said insurance. That it denies that it ever received said horse or said note of $400 as premiums for any insurance upon the life of said Frederick Hoffman or otherwise. That it
33 denies that said A. C. Goodwin ever issued or delivered said "conditional receipt," set out in said bill, as the agent of this respondent, but alleges that he issued and delivered the same, if at all, without any authority from this respondent or its authorized agent, and without its consent, and that said receipt was never placed in the hands of said A. C. Goodwin by this respondent or its agent, but was obtained by said Goodwin surreptitiously and against the will of this respondent, and denies that by said receipt it promised or agreed to do any act whatever.

That it admits that a policy of $8,000 upon the life of the said Frederick Hoffman was written out at the home office of this respondent in Boston, Massachusetts, upon an application therefor by said Frederick Hoffman, a copy of which policy is hereto attached and marked Exhibit "A," and made a part hereof; that it admits that said policy was forwarded by this respondent to said Justin E. Thayer, its agent at Cleveland, Ohio, to be by him delivered to said Frederick Hoffman, upon the payment by said Hoffman of the premium due for and upon said policy; that it denies that said Thayer accounted with this respondent for the premium upon said policy, or any part thereof, or that said Thayer ever received from or was allowed by this respondent any commission

thereon; that it denies that said A. C. Goodwin ever received from or was accounted with by this respondent for any commissions on said policy; that it denies that said Frederick Hoffman done and performed everything on his part to be done and performed in order to entitle him or the complainant to said policy, but alleges that said Frederick Hoffman failed to pay the premium for and upon said policy; that it denies that said Justin E. Thayer fraudulently withheld said policy from said Frederick Hoffman, but alleges that said Thayer refused to deliver said policy solely because said Hoffman failed and refused to pay the premium therefor as by the terms of said policy he was bound to do, and alleges that neither this respondent nor said Thayer as its agent ever received the premium upon and for said policy, or any part thereof.

And this respondent, further answering, says that it is informed and believes, and so alleges the facts to be, that said Frederick Hoffman was solicited to procure said insurance by said A. C. Goodwin, who was merely an insurance-broker, having no connection whatever with this respondent, or with said Justin E. Thayer; that if any arrangement was made with said Frederick Hoffman whereby he was to pay his premium in anything but cash, it was made by said Goodwin without any knowledge or authority whatever on the part of this respondent; that said Justin E. Thayer refused to deliver said policy to said Frederick Hoffman solely for the reason that said Hoffman would not pay the premium thereon; and that said Thayer never in any way consented to take the premium therefor in anything other than money, and never promised himself to assume it This respondent alleges that said Justin E. Thayer had no authority to take or receive the cash portion of said premium in anything other than money, and that such is the general and well-known custom in the business of life-insurance. This respondent, further answering, says that said Frederick Hoffman did not tender or offer to perform the things which he would be compelled to perform in order to keep said policy alive had it ever taken effect, viz, that he did not pay or offer to pay the premiums subsequently due upon said policy, had it ever vested, in order to keep said policy in force.

This respondent further alleges that, after the date when said contract is alleged to have been entered into between said Frederick Hoffman and this respondent, and during the life of the said Frederick Hoffman, the said Frederick Hoffman himself rescinded said contract and brought suit in the common pleas court of Cuyahoga County, Ohio, to recover of this respondent the premium alleged by him to have been paid this respondent upon and for said policy a copy of the records of which proceeding this respondent has ready to be produced in court.

WILLEY, CARY & TERRELL,
Solicitors for Respondent.

NORTHERN DISTRICT OF OHIO, *ss:*

H. L. Terrell, being duly sworn, says that the facts set forth in the foregoing answer are true to the best of his knowledge and belief, and that he is one of the solicitors of the above-named respondent, duly authorized in the premises.

H. L. TERRELL.

Sworn to and subscribed before me this 6th day of April, A. D. 1872.

CHAS. H. ROBINSON,
U. S. Commissioner.

EXHIBIT A.—*Policy.*

Exhibit "A."—No. 8,995.—Age, 38.—Payments, cash, $553.38; note, $369.—Payable annually.

JOHN HANCOCK MUTUAL LIFE-INSURANCE COMPANY OF BOSTON.

37 This policy of assurance witnesseth that the John Hancock Mutual Life-Insurance Company, in consideration of the representations made to them in the application for this policy, on the faith of which this policy is written, and of the sum of nine hundred and twenty-two dollars and fifty-eight cents to them paid by Frederick Hoffman, of Cleveland, in the State of Ohio, being the assured in this policy, and of the annual premium of nine hundred and twenty-two dollars and fifty-eight cents, to be paid at the office of said company in Boston, or to their agents producing the receipt of said company, on or before the seventh day of August, in every year, until ten annual premiums shall have been paid, or during his life if his decease shall happen within ten years from August 7th, 1869, at noon, do insure the life of Frederick Hoffman, of Cleveland, in the county of Cuyahoga, and State of Ohio, in the amount of eight thousand dollars; and the said company do hereby promise and agree to and with the said assured, his executors, administrators, or assigns, to pay at their office in Boston the amount of said insurance to the said assured, ten years from August 7th, 1869, or, in case of prior decease, to his wife, Henrietta Hoffman, sixty
38 days after due notice and proof to them at their office in Boston, of the death of the said person whose life is hereby insured. At any time after one annual premium has been paid, as stipulated in this policy, it may be surrendered at the option of the assured; and he will be entitled to receive in lieu thereof a paid-up or non-forfeiture policy for an amount pro rata to the number of cash premiums paid, to wit: for one-tenth of the amount insured by this policy for each and every annual cash premium paid thereon, provided application for such paid-up policy is made within 30 days after the non-payment of any premium due; otherwise this policy will continue only under the Massachusetts non-forfeiture law below referred to. This policy is made and accepted by the assured upon the following express conditions: If the said person, whose life is hereby insured, shall pass beyond the limits of the United States (except as herein permitted) or south of the latitude of the southern boundary of Virginia between the first of June and first of November, in any year, or enter into any military or naval service of the United States, (the militia not in actual service ex-
39 cepted,) or shall (except as herein permitted,) enter upon a voyage upon the high seas, or shall be personally employed in any mine or powder manufactory, or on any railroad or steamboat as conductor, expressman, engineer, fireman, brakesman, or switchman, or in working or managing a steam-engine in any capacity, without the consent of this company, in each and either of the foregoing cases previously given in writing; or if he shall die by his own hands, or in, or in consequence of, a duel, or by the hands of justice, or in, or in consequence of, violating the laws of the United States, or of any State, county, province, or place; or if any of the statements, answers, or declarations made in the application for this policy shall be found in any respect untrue, then this policy shall be null and void, which said application is hereby referred to and made a part of this policy. The person whose life is hereby insured has liberty to go as passenger on any voy-

age by water along the Atlantic coast of Nova Scotia, New Brunswic, or the United States not south of the mouth of the river Mississippi, with liberty to touch at any intermediate ports, and in Cuba, and
40 to reside in Cuba between the first of December and first of April in any year; also to go as passenger between Europe and any of the Atlantic or Gulf ports of the United States, not south of the mouth of the river Mississippi, and to touch at the usual ports; also to make excursions by boat or vessel on the sea-coast, or any river, lake, or pond, for health, recreation, or sporting; also to travel on the ordinary routes of inland-travel by the usual modes of conveyance; and may reside and travel indefinitely in Europe, Nova Scotia, New Brunswic, and Canada. If any premium on this policy shall not be paid on or before the day when due this policy shall thereupon become forfeited and void, except as provided by 186th chapter of the acts of the legislature of Massachusetts in the year 1861, entitled "An act to regulate the forfeiture of policies of life-insurance." But in such case the insured shall not be entitled to any return of premium or share of the surplus funds. This policy and any sums that shall become due thereon to the said company are pledged and hypothecated to said company, and they have a lien thereon to secure the payment of any premium or part thereof on which
41 credit may be given, and of any note or security therefor; but this pledge or hypothecation shall in no respect defeat or affect the conditions and provisions respecting the forfeiture of this policy. Said company shall have a right to set off any demand they shall have against said assured, his assigns or representatives, arising incidentally to or in connection with this insurance, against any claim thereon. No suit shall be brought against said company on any claim under this policy, unless said suit is commenced within two years from the time when the right of action accrues, and also within three years from the termination of the life insured. Any assignment of this policy shall be void unless assented to in writing by said company.

In witness whereof the said John Hancock Mutual Life-Insurance Company have, by their president and secretary, executed and delivered this contract at Boston, on this thirteenth day of August, A. D. 1869.

GEO. P. SANGER, *President.*

GEO. B. AGER, *Secretary.*

(No person except the president or secretary is authorized to make, alter, or discharge contracts or waive forfeitures.)

UNITED STATES OF AMERICA:

42 And afterward, to wit, on the 22nd day of April, A. D. 1872, was filed herein the following reply, which is in the words and figures following, to wit:

Reply.

In the circuit court of the United States for the northern district of Ohio, in equity.

HENRIETTA HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE-INSURANCE Company of Boston. } Reply.

The orator herein now comes, and, replying to the answer of the respondent herein, says it is not true that the said Frederick Hoffman at

any time during his life-time rescinded said contract of insurance, or that said respondent ever paid back to him or to your orator any portion of the premium which the said Frederick had paid to such respondent.

ELWELL & MARVIN,
B. R. BEAVIS,
Solicitors for Orator.

NORTHERN DISTRICT OF OHIO, *ss :*

Henrietta Hoffman, being duly sworn, says that the facts set forth in the foregoing reply are true as she verily believes.

HENRIETTA HOFFMAN.

Subscribed in my presence and sworn to before me the 20th day of April, A. D. 1872.

[SEAL.]

W. H. BIRNEY,
Notary Public.

Continued.

43 And afterward, to wit, at the April term of said court, to wit, on the 28th day of September, A. D. 1872, this cause is continued to the next term of the court.

Hearing.

And afterward, to wit, at the January term of said court, to wit, on the 29th day of January, A. D. 1873, came the parties by their solicitors, and this cause came on for trial upon the bill, answer, and reply filed herein; and the testimony of witnesses being finished, and the arguments of counsel having been commenced but not concluded, the further trial of this cause is adjourned until to-morrow.

Cause under advisement.

And afterward, to wit, at said January term of said court, to wit, on the 30th day of January, A. D. 1873, came again the parties by their solicitors; and this cause coming on again for hearing, the arguments of counsel were concluded, and the same taken under advisement by the court.

Decree for respondent.

And afterwards, to wit, at said January term of said court, to wit, on the 4th day of February, A. D. 1873: and now the court having duly deliberated upon the testimony and arguments of counsel in this cause, and being fully advised in the premises, doth find that the equity of the cause is with the said respondent, and doth order, adjudge, and
44 decree that the complainant's bill stand dismissed with costs; which costs, to be taxed by the clerk, shall be paid by the complainant within ten days, or, on default thereof, it is ordered that execution issue therefor as upon judgments at law.

Appeal.

And thereupon said complainant by Messrs. Cadwell & Marvin, her solicitors, gives notice of her intention to appeal this cause to the Supreme Court of the United States; which said appeal is allowed, and bond therefor is fixed at the sum of one thousand dollars.

TESTIMONY.

The following is the oral testimony introduced by the parties on the hearing of the above cause before the court, reduced to writing by Benjamin Weaver, stenographer, to wit:

HENRIETTA HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE-INS. CO.

This cause came on for trial in the circuit court of the United States for the northern district of Ohio, on the 29th day of January, A. D. 1873, before his honor Judge Sherman; and the plaintiff, to main-
45 tain the issue upon her *her* part, introduced the following evidence:

Letter of Thayer to deft. admitted.

It is agreed by the defendant that plaintiff may introduce in evidence, and use, so far as competent, a letter written by Justice E. Thayer to the defendant, bearing date which is attached to the deposition of the officers of the company.

Death of Hoffman, &c., admitted.

The death of Frederick Hoffman, and the cause thereof, and his burial, is admitted as set forth in the bill.

Plaintiff offered in evidence the agreement between the defendant and Justin E. Thayer, of Cleveland, under which the said Justin E. Thayer acted as general agent of the company, dated January 2nd, 1869. (Set forth among the proofs hereinafter.)

Dan'l Hamilton.

DANIEL HAMILTON, a witness called on behalf of the plaintiff, having been duly sworn, was examined in chief by Mr. Marvin, and testified as follows:

Q. Where do you reside?

A. In the city.

Q. Are you acquainted with Justin E. Thayer?

A. Yes, sir; somewhat.

46 Q. How long have you been acquainted with him?

A. Since '65, I guess.

Q. Are you acquainted with Mr. Goodwin?

A. Yes, sir; somewhat.

Q. Was you acquainted with Mr. Frederick Hoffman during his life-time?

A. Yes, sir.

Q. State what you know about a horse being brought to you in the fall of '69, or any one else, that was said to have at one time belonged to Mr. Hoffman.

A. Mr. Goodwin told me that he took a horse from Mr. Hoffman on insurance & wanted me to sell that horse.

Q. When did you first become acquainted with that horse?

A. In the summer of '69, I think it was.

Q. Where was the horse at that time when you first knew him?

A. I first saw the horse on the square opposite the John Hancock office.

Q. In whose possession at that time?

A. Mr. Goodwin said it was a horse that he had taken on that insurance policy.

Q. Afterwards what became of the horse?

47 A. Well I undertook to sell the horse.

Q. What time was this you saw him first?

A. In the summer of '69. It might have been as late as July. I think it was along in June or July, I am not certain which.

Q. As late as August or September?

A. Well, I am not sure which.

Q. You think it was about that time?

A. Yes, sir.

Q. Did you have the keeping of that horse at any time?

A. Yes, sir; a short time.

Q. Where?

A. I took him up to the barn, near Scovil street, near Perry.

Q. During the time that horse was in your possession, did you have any conversation with Mr. Thayer in regard to the horse and this insurance?

A. Oh, yes.

Q. State to the court what he said in regard to how he come by the horse and what he said in regard to this insurance.

A. I wanted to have Mr. Goodwin go with me to the oil-regions,

48 and the sale of that horse seemed to be the trouble why he could not go with me at that time; and he wanted Mr. Thayer to take the horse at such an amount of money. Mr. Thayer said it was too much money for him to pay. I tried several places and finally found a place where I could turn the horse in on property at a very good price. I think Mr. Thayer went with me.

Q. What did he say about the horse?

A. He said he didn't want to advance such a sum of money for this property as he would have to in case the man would take the horse.

Q. What property was this he went with you to look at?

A. It was a house and lot.

Q. He said he could not advance so much money?

A. He didn't want to.

Q. What did he say to you in regard to the insurance, and how he had come by the horse?

A. There was so much of that horse belonged to the John Hancock Company.

Q. He said that?

49 A. I so understood him.

Q. Did he say what amount?

A. He didn't care what Mr. Goodwin done with the horse, only so much money must go to the John Hancock Company.

Q. Did he say anything about his commissions at that time, either his or Mr. Goodwin's.

A. The commission was talked about, but I can't recollect now what was said.

Q. How often did Mr. Thayer come to see the horse while it was in your possession?

A. He was there a number of times.

Q. How often was Mr. Goodwin there?

A. I don't recollect of Mr. Goodwin being there at any time.
Q. Who took the horse away from your place?
A. Mr.
Q. About what time was it he took this horse away?
A. He took him away at different times, and then put him back again.
Q. Why was he finally taken away, out of your possession?
A. I can't say.
50 Q. You don't recollect now?
A. No, sir.
Q. Do you recollect having a conversation with Mr. Thayer as to the reason why you would not keep him longer?
A. There was something said about a buggy; Mr. Thayer's buggy was connected with the horse.
Q. Another matter I wish to call your attention to, you may not immediately recollect: how often was this horse taken away from you while he was there?
A. Frequently.
Q. Was you selling horses at that time?
A. Yes, sir.
Q. If you was selling horses, could you sell him while he was there in your possession?
A. No, sir.
Q. Now you may state what reasons you gave to Mr. Thayer, if any, in regard to the matter of his taking the horse away.
(Objected to.)
The COURT. Is that necessary? All you want to prove is that Mr. Hoffman paid the horse on this matter.

Cross-examination by Mr. Terrell:

51 Q. You say you tried to sell it to Thayer?
A. Yes, sir.
Q. He didn't want it at the price?
A. No, sir.
Q. You say it was fixed up with a buggy matter; what was that?
A. Mr. Thayer's buggy, as I understood it, was connected with the horse, and the gentlemen wished to have the horse stay where it was.
Q. The horse, or the buggy and harness?
A. That I can't tell; he didn't wish any of the property to stay where it was; he was either afraid of something or that kind. I think he said something of that kind.
Q. In whose name was the horse put into the stable?
A. I think in Mr. Goodwin's. I am not sure, but I think so now.
Q. You say Mr. Thayer said there had got to so much money come to the John Hancock Insurance Company?
A. Yes, sir; so much of that horse had got to go into the John Hancock Insurance Company.

Redirect examination:

Q. In this transaction in regard to trading for the house and lot, tell us more about that.
52 A. There was a gentleman wanted to sell his house and lot, and Mr. Thayer and myself went there to look at the property, and I further urged him to take the property because I thought there was money it; the horse would turn very well in that trade.
Q. For how much?
A. It was either 5 or 6 hundred dollars.
Q. What is the reason he didn't take the property?

A. He didn't want to put that much money in it.
Q. Do you know who paid the board of this horse while he was in your possession?
A. Mr. Thayer paid it.
Q. By Mr. Terrell: You say Mr. Thayer paid for it; didn't you take an order for him from Mr. Goodwin?
A. I think I took the bill in Mr. Goodwin's name to Mr. Thayer, and he paid it.

A. C. Goodwin.

A. C. GOODWIN, a witness called on behalf of the plaintiff, having been duly sworn, was examined in chief by Mr. Marvin, and testified as follows:

53 Q. Where do you reside?
A. Cleveland, Scovil street.
Q. Where was you residing in '69, during the spring, summer, and fall?
A. East Rockwell.
Q. Are you acquainted with Justin Thayer?
A. Yes, sir.
Q. How long have you been acquainted with him?
A. Several years; since '65.
Q. Have you at any time acted as agent for the John Hancock Mutual Life-Insurance Company?
A. Yes, sir.
Q. If so, when and where?
A. I commenced working for the John Hancock Life-Insurance Company, under the direction of Mr. Thayer, April 7th, '69.
Q. By an arrangement with whom?
A. Justin Thayer.
Q. Is that arrangement in writing?
A. Yes, sir.
Q. Look at that instrument and tell us whether that is the contract.
A. Yes, sir.
(The witness read the contract referred to to the jury.)
54 Q. How long did you continue to work under that contract?
A. Until the first of August, '69.
Q. Were there any other arrangements made then?
A. After the first of August there was an arrangement made by Mr. Thayer with me to work on a brokerage.
Q. What was that arrangement?
A. 30 %.
Q. Where was your office at that time?
A. No. 1, Lyman's Block.
Q. With whom?
A. Mr. Thayer.
Q. Was that the office of the John Hancock Insurance Company in this city.
A. It was at that time.
Q. What were your duties under that?
A. To solicit applications for life-insurance.
Q. How did it differ from that except as to rate?
(Objected to; no ruling.)
Q. You say your commission was different?
A. 30 %.
Q. What were your duties? and, if different from that, say so.

A. They were the same.

Q. Now you may tell us what you know about this Hoffman insurance.

A. I solicited Mr. Hoffman's application and had talked with him two or three weeks before this—before I commenced on the brokerage—and told Mr. Thayer I had several applicants here in the city. In the mean time, Mr. Thayer said he wasn't satisfied to pay the hundred dollars a month any longer, and would rather I would take a brokerage, and then I would satisfy myself and everybody else. Said I, "Very well, I will do so." On the 7th or 8th of August I fetched him some applications for $8,000. Previous to that, a day or two previous, Mr. Thayer went with me to see Mr. Hoffman. I told him what arrangement I had made with him in regard to taking the horse. Said he, I will go over and see the horse. He went over and he made the remark to Mr. Hoffman that he thought the horse was pretty high. Mr. Hoffman said, "That is my price; if you don't want him, you need not take him."

56 We went across the road to his depository, and then he went home. The next day Mr. Thayer told me to go over and take the insurance, and take the horse. In the first place, I asked him what he would do with Mr. Hoffman. He said, "I guess you had better go over and close the note up. We will sell the horse; dispose of him in some way." I went over and got the horse, and put him in a stable. During the day Mr. Thayer took the horse home.

Q. You say you took his application?

A. Yes, sir.

Q. What did you do with it?

A. Delivered it over to Mr. Thayer.

Q. What else did you take?

A. Took his premium-note of $369, and a note of $100, due in sixty days.

Q. His promissory note?

A. Yes, sir.

Q. Where was that payable?

A. At the bank. The balance of $53 which I owed Mr. Hoffman; I assumed to turn that over and charge that to me. The horse was called four hundred dollars.

57 Q. Making in all five hundred and fifty-three dollars and some cents?

A. Yes, sir.

Q. You took the premium-note of three hundred and sixty-nine dollars?

A. Yes, sir.

Q. Was that the usual premium-note for such an insurance?

A. Yes, sir.

Q. What was the amount of the insurance?

A. Eight thousand dollars.

Q. What plan?

A. Ten years' endowment—to be paid in ten years.

Q. Was there a medical examination made?

A. Yes, sir.

Q. By whom?

A. Doctor Jone, I think it was—Dr. William Jones.

Q. The applicatian you say you delivered to Mr. Thayer?

A. Yes, sir.

Q. What did you do with this premium-note?

A. I either laid it on Mr. Thayer's desk, or gave it to the boy

58 there in the office.

Q. What else did you give Mr. Hoffman at that time?
A. I gave him a "binding receipt."
Q. You gave him what is called a binding receipt?
A. Yes, sir.
Q. State to the court whether that is the receipt you gave him.
A. Yes, sir.
(Receipt referred to dated August 7th, 1869, and read in evidence by the plaintiff. Copy set forth in bill.)
Q. Do you recollect when this policy arrived?
A. Some time in August Mr. Thayer told me Mr. Hoffman's policy was there for him, and to have him come over and get it.
Q. What did you do?
A. I told Mr. Hoffman of it.
Q. Do you know whether he came over or not?
A. Only what he told me himself. Mr. Thayer told me afterwards he came over.
Q. Do you know whether he got his policy?
A. I think he did not.
59 Q. Has Mr. Thayer given you any information in regard to that?
A. No, sir.
Q. You state of a premium-note given at that time; you may state what your premium-note was like.
(Objected to, on the ground that the note shows.)
Q. State whether it was the usual premium-note.
A. Yes, sir.
By the COURT. The witness says the note was given, and the amount; that is all that is necessary.
Q. That is the form of one of the notes? (handing note to witness.)
A. Yes, sir.
Q. Where did that come from?
A. In Mr. Thayer's office.
Q. Had you the notes at that time?
A. Yes, sir; I had notes and receipts; I was supplied with them.
Q. Who supplied you with them?
A. Mr. Thayer.
Q. Did you take a receipt at the time this amount you was owing Mr. Hoffman was paid?
A. I took a receipt for part of it; previous to that I had,
60 along in the winter, bought a sleigh of Mr. Hoffman for forty dollars, and then, in addition to that, I had some repairs done on a buggy, amounting to some thirteen dollars. I had a receipt for forty dollars, and I had a receipt for the thirteen dollars, but I can't find it. The whole amount was receipted by Mr. Hoffman.
Q. This note that was taken for the hundred dollars; do you know what became of that?
A. I turned the note over to a man named W. G. Smith.
Q. What were your commissions on that policy?
A. Two hundred and seventy-six dollars and some cents.
Q. How much did you receive of this Hoffman name on that?
A. One hundred and fifty-seven dollars and fifty-seven cents.
Q. You received your pay on that note?
A. So far.
Q. How did you come to negotiate the note?
A. Mr. Thayer was owing me at the time money, and I was repeatedly asking him for it, and he said to get the Hoffman note dis-
61 counted, and then I would not be asking him for money. I told

him I would do it in due time. I found where I could use the money and did so.

Q. Do you know anything about what became of this horse after you turned it over to Mr. Thayer?

A. I do not; the horse was in Mr. Thayer's possession some six weeks; what he done with it I don't know.

Q. Have you ever heard Mr. Thayer say anything in regard to it?

A. No, sir.

Q. Never heard him testify in regard to it?

A. No, sir.

Q. Did you hear Mr. Hoffman testify in the trial of this cause in the common pleas court?

A. I did, sir.

Q. In the case of Hoffman against the John Hancock Insurance Company?

A. I did, sir.

Q. Are you able to state what he testified in regard to this transaction?

A. Not all of it; some parts of it I can remember.

Q. You may state what he stated in regard to what Mr. Thayer said to him as to this insurance—as to taking this property.

62 (Objected to as incompetent. Received, subject to exceptions.)

A. He said he called for the policy, and Mr. Thayer demanded a hundred dollars more. He wanted to know for what purpose, and Mr. Thayer told him he had not got money enough with the horse for the policy, and he told him he knew there was a hundred dollars more to be paid, but it was in the shape of a note which was not yet due; but Mr. Thayer said that he wanted more than that note; that the note was payable to Goodwin and not to him. He wanted he should stop payment on the note, and Mr. Thayer insisted on the hundred dollars more than he had received.

Q. Do you recollect anything more that was said about hunting up a note or anything of that kind?

A Yes; he said they went together—him and Mr. Thayer—to hunt up the note and find where the note was, and they found the note, and Mr. Hoffman said he should pay it when it was due.

Q. What did he say as to whether the policy was delivered to him or not?

63 A. He said the policy would not be delivered unless he paid the extra hundred dollars.

Cross-examination by Mr. Terrell:

Q. Mr. Goodwin, where did you get this? (referring to receipt.)

A. In Mr. Thayer's office.

Q. Who delivered it to you?

A. Nobody.

Q. Where did you find it?

A. On Mr. Thayer's desk.

Q. Have you had it ever since?

A. No; I had it until the fall of '69, when I entered suit in the common pleas. I put it in my attorney's hands.

Q. Was Mr. Thayer in the office when you got it?

A. I don't know whether he was or not. Mr. Thayer promised to deliver me the contract, previous to the time I have got that, several times.

Q. I don't ask you anything about that. Was that stamp on that when you got it?

A. I don't know whether it was or not.
Q. Don't you know you put it on afterwards?
A. I can't tell positively.
64 Q. Don't you know you did?
A. I could not tell.
Q. Can you tell whose writing that is on the stamp?
A. I can.
Q. Whose is it?
A. That is my own.
Q. Whose writing is the body of the contract in?
A. Mr. Thayer's, I suppose; it looks like his writing.
Q. Where did you get this conditional receipt?
A. Of Mr. Thayer.
Q. He gave it to you personally?
A. Yes, sir.
Q. You swear to that, do you?
A. Yes, sir.
Q. He had them in his office?
A. Yes, sir.
Q. Furnished them to his subject agents?
A. Yes, sir; he did to me.
Q. And also the premium note which you say Hoffman had?
A. Yes, sir.
Q. He gave you them?
A. Yes, sir; he gave me several of them.
65 Q. What did you say you did with them?
A. Left it in Mr. Thayer's office on his desk; either on his desk or with his boy he had there.
Q. You swore about that on the other trial?
A. Yes, sir.
Q. You swore then you left it on his desk?
A. I swore I left it on the desk or with the boy.
Q. Did you say that you either left it on the desk or with the boy?
A. Yes, sir.
Q. You have no recollection which?
A. No, sir.
Q. Who was the boy?
A. I have no recollection.
Q. James Kennedy?
A. I believe so.
Q. Is that the way you usually made your reports to the general agent?
A. There was no report there to make particularly.
Q. When you got out a solicit—application—and get premiums, and bring in your reports, you have no report to make, ah?
66 A. I generally lay them on the desk if he is not there.
Q. This receipt has not been changed since you gave it?
A. No, sir.
Q. What is all this scratch on it?
A. That was done at the same time it was given.
Q. Why was it done?
A. I don't know; there might have been some mistake in the figuring.
Q. Who wrote this; you?
A. Yes, sir.
Q. You don't remember what the mistake was?

A. No, sir.
Q. You had a con*tract* with Mr. Plaisted about that contract, didn't you?
A. I don't know whether I did or not.
Q. You never did?
A. I might have had a conversation with him.
Q. Didn't you tell him you stole it out of Thayer's desk when he was not there?
A. No, sir.
Q. You know Mr. Plaisted?
A. I do.
67 Q. You say when Thayer went over there he said to Hoffman he had too high a price on the horse?
A. He said to Mr. Hoffman he thought he had too high a price on his horse.
Q. You left them there together?
A. Yes, sir.
Q. You say next day Thayer told you to go there to take the horse?
A. Yes, sir.
Q. For four hundred dollars?
A. Yes, sir.
Q. And you did it?
A. I did it, according to instructions.
Q. Four hundred dollars for the horse, and note for one hundred dollars, payable in 60 days; and you canceled a private debt of your own to Hoffman of fifty-three dollars & some cents.
A. Yes, sir.
Q. And the balance was this premium note?
A. Yes, sir.
Q. When do you say this contract of brokerage commenced?
A. The first of August.
Q. Up to that time you say you had been working under this written contract?
68 A. Yes, sir.

Redirect examination:

Q. I wish to inquire as to what books in the office were used in regard to this application.
A. There is what is called an "application-book," to copy applications in.
Q. As they are taken?
A. They application was taken in the book, and then the application was sent on to the company. The form of this application was kept in what is called an "application-book."
Q. Was there such a book in that office?
A. There was.
Q. Who kept this application in that book?
A. I won't be positive whether I did. I won't be positive; I think I did.
Q. Do you recollect how many applications you had copied in that book? Do you recollect how many policies you had taken?
A. Seven or eight.
Q. State who they were, and when.
A. William Bailey, Jefferson, Ashtabula County, April 16th, one thousand dollars sent to Mr. Thayer from Jefferson; N. E. French,
69 Jefferson, one thousand dollars, same date; May 3d, Erastus

Day, two thousand dollars; Mr. Curtis, one thousand dollars, May 3d; May 18th, George Dowley, one thousand dollars; July 9th, John T. Dweese, five thousand dollars; August 7th, Frederick Hoffman, eight thousand dollars; and October 2nd, Mr. Warren, five thousand dollars.

(Plaintiff puts in evidence application known as application No. 52, on the life of Frederick Hoffman, for $8,000. Copy attached to def'ts dep.)

Also, offered in evidence letter from J. E. Thayer to George P. Sanger Boston, dated Cleveland, August 9th, '69. (Copy attached to def'ts dep.)

Also, proof of loss, physician's certificate, signed by J. E. Schenck, sworn to before a notary. (Admitted.)

Also, the identity of the party sworn to by a friend. (Admitted.)

Also, Sexton's certificate, and proof from the minister who officiated at the interment. (Admitted.)

Also, a proof of the age of the deceased. (Admitted.)

Admitted that the company received proofs of loss March 15th, 1871.

Also, pamphlet alleged to contain the law of Massachusetts under which the defendant acts.

70 Q. Do you know what books are furnished to the agents?

A. Pamphlets.

Q. Is that one of the pamphlets?

A. Yes, sir.

Q. State whether that is the pamphlet furnished to the parties who insure in the John Hancock Insurance Company?

A. It is like the one I used at that time.

Q. State whether you had a book containing a law like that?

A. Yes, sir.

Q. Did you give Hoffman one?

A. Yes, sir. We all defer to that law in regard to getting insurance under that.

Pamphlet received subject to exception.

Plaintiff rests.

Recess until two o'clock.

DEFENSE.

The defendant, to maintain the issue upon its part, introduced the following evidence, to wit:

71 *Ivory Plaisted.*

IVORY PLAISTED, a witness called on behalf of the defendant, having been duly sworn, was examided in chief by Mr. Terrell, and testified as follows:

Q. Do you reside in the city?

A. I reside in East Cleveland.

Q. Do business in the city?

A. Yes, sir.

Q. What is your business?

A. Following the law-business in the city. That is the main thing; divers things mixed up with it.

Q. You may look at that paper that you have in your hand there, and state what it is.

A. I don't know that this is the same one. This is the one or a copy of it. I have seen this paper before.

Q. Who had it?

A. Mr. Goodwin handed it to me.

Q. Where did Mr. Goodwin say he got it?

A. If this is the paper, or one just like it, he said he got it on Mr. Thayer's desk, or out of his desk; I can't say which.

Q. Under what circumstances did he say he got it?

72 Mr. MARVIN. I would like to know under what circumstances this was said.

A. There was considerable circumstances connected with it.

Q. Was he your client?

A. O, no; it was with reference to a matter he was owing me. He was owing me three or four hundred dollars, and I was holding chattel-mortgage to secure it; and he was making promises how he was going to pay it; and he said he had means of paying it, and he brought this as one of the matters to establish that he had the means of paying it. He showed me this, and I read it carefully. He had been to work under this contract. I had never seen it before, but he brought it to me and showed it to me. Said he, "I got this out of Thayer's desk, because I thought, from his talk, that he acted as though he wanted to back out of his agreement; and," said he, "I never had the contract in my hands; that is, he never delivered it over to me, and I thought that while I had a chance to take it I would take it."

73 Q. What did he say about Mr. Thayer's being there?

A. He said——was not there. He said he had a contract with Mr. Thayer out of which he was going to get the money and pay me.

Cross-examination by Mr. Marvin:

Q. When was this?

A. It was some time after the date of this contract. It was that year, but I can't remember what month it was.

Q. Can you tell what time it was?

A. My impression is it was in July, for he didn't pay me promptly as he had agreed to—so much a month; and I was pressing him a little for payment.

Q. The object of his showing it to you was to show that he was doing a business under which he was to derive a profit?

A. Yes, sir.

Q. Did he claim he was doing business under that contract?

A. I don't know what he claimed verbally. It was to show, I suppose, that Thayer was obliged to employ him.

74 Q. Did he claim he was in the insurance business for this company at the time?

(Objected to. Sustained. Exception by plaintiff.)

Q. He gave you to understand, did he not, that that was the contract that he was working under, or had been?

A. Yes, sir.

Q. He gave you to understand in that conversation, did he not, that this contract had been signed by Thayer; this paper that you say you saw?

A. Well, I don't remember; I think I examined the paper. His name was signed, but Goodwin's was not signed.

Q. He claimed that he had a right to that paper, did he not?

A. I don't know as he made any particular claim. I think I asked him something about what the effect would be. He said that was the contract.

Q. And didn't he also claim to you, in that very conversation, that, though he said he took it from the desk, that it was left there for him?

A. No; he didn't say that; he said he thought he would take
75 it while he had an opportunity to take it. I know I told him, in conjunction with it, "If he didn't intend to let you have it, why, you have no right to it."

Q. What did he say to you in reply to it?

A. I don't remember. I think he intimated to me that he had mutually left it in that way for some reason or other. I don't remember particularly what he said in reference to that.

Defendant's counsel read deposition of George B. Sanger. Subject to exception. Also read deposition of George B. Ager.

Justin F. Thayer.

JUSTIN E. THAYER, a witness called on behalf of the defence, having been duly sworn, was examined in chief by Mr. Terrell, and testified as follows:

Q. Where do you reside?

A. Cleveland.

Q. What is your business now?

A. Life insurance.

Q. Are you connected with the John Hancock Life-Insurance Company?

A. I am not now, sir.

76 Q. In '69 what was your business?

A. General agent of the John Hancock Mutual Life-Insurance Company.

Q. Where stationed?

A. Cleveland.

Q. Do you know this man Goodwin?

A. I do, sir.

Q. State whether he worked for you at any time.

A. He did work for me two months in '69, I think.

Q. What months?

A. April and May. He worked from the 7th day of April to the 7th day of June.

Q. Under what arrangement?

A. Well, in the first place we made an agreement for a contract, which was to be carried out if he could do as much business as he said he could. We made a bargain, and I was to give him a trial of one month. We agreed upon a contract, which was to take effect in case he done a certain amount of business, and he was to have a month's trial.

Q. State what happened?

A. At the end of the first month he didn't do as much as he
77 expected he could do, or said to me that he could do; and he said that the reason of it was that he had sickness in his family, and several things—family troubles that kept him from being in the field all the time, and he wanted me to try him another. I told him to go on and try another month. At the end of the second month his business didn't prove any better, and I told him I couldn't deliver any contracts or carry out any agreements I had made with him, and he said all right, he didn't blame me. I then settled up with him. Mr. Goodwin then made the remark that he liked that company to work for, and he wanted to know if I could give him employment as a broker. I told him I

would give him what commission there was in the business for the first year.

Q. From that time on, whatever policies he brought in, he was to have a brokerage or commission on?

A. Yes, sir; for whatever he done for me from that time on. He wasn't employed as an agent for me, or anything of the kind.

78 Q. Look at that paper, and state what it is, (handing paper to witness)

A. That is my writing.

Q. What is it?

A. That was the agreement I was to carry out in case he done the business he thought he could do. It was deposited in my private desk, in my office, No. 1 Lyman's Block.

Q. If you know, you may state how that came in the possession of this man Goodwin.

A. I don't know any further than—the first I knew of it was when I was sued for what he claimed I owed him. The first I knew of it, it was attached to a petition he had made against me in a suit.

Q. State whether you delivered it to him.

A. I did not.

Q. State if you knew at the time of its going into his possession.

A. I did not.

Q. State whether you consented to his taking it.

A. I did not.

79 Q. Look at that paper, (handing paper to witness, called binding-receipt,) and state whether you have seen that before.

A. I have, sir.

Q. That is the binding-receipt Mr. Goodwin says he gave Hoffman?

A. It is so stated by Mr. Hoffman.

Q. That appears to be signed by Mr. Goodwin?

A. Yes, sir.

Q. What is the date of that?

A. August 7th, 1869.

Q. State if you know where Mr. Goodwin got that receipt.

A. I do not know.

Q. State whether he got it from you.

A. No, sir.

Q. State whether, while he was working as your agent from the 7th of April to the 7th of June, he had any of these, to your knowledge.

A. He had not to my knowledge.

Q. Then I understand you to say you didn't deliver that to him, and don't know where he got it.

A. I never did.

80 Q. State by whom these receipts were usually signed.

A. They were signed by me. I never issued them to an agent, only to one that was under bond.

Q. When you issued to him, did you issue in blank or with your signature?

A. If an agent was under bond, then they were issued to him to be signed by himself.

Q. About these premium notes. State whether you furnished Mr. Goodwin with premium notes.

A. I never did.

Q. State now the usual course of business when the policy is transmitted from the home office to you, made out upon an application; what usually accompanies it?

A. The premium note to be signed when the policy is delivered.

Q. That is the usual course of business?

A. Yes, sir; filled out at the home office, and accompanies the policy, to be signed when the policy is turned over.

Q. You say you did not furnish Mr. Goodwin with premium notes?

A. I did not.

81 Q. State what knowledge you have of any premium note in the Hoffman case.

A. I never issued any note in the Hoffman policy, in the payment of that premium. I saw one in blank filled out to be delivered when the policy was paid.

Q. State if this is the plolicy and the blank premium note sent on by the home office? (handing paper to witness.)

A. It is the policy, and I should say the premium note, although I could not say for certain whether that was it or not, and could not tell only by the handwriting. I judge it was the handwriting of the clerk that usually does that business.

Q. You say you never saw any premium note in the case of Hoffman?

A. Never saw any signed.

Q. State whether you ever saw any lying on your desk in your office?

A. No, sir.

Q. State now what knowledge you have about the soliciting of the insurance of Frederick Hoffman?

A. After the closing up with Mr. Goodwin and the settling of

82 his accounts, I went away to New York, and was gone nearly a month, I don't remember just the time; and soon after my return Mr. Goodwin came in my office and said he knew a man on the west side that wanted to insure for ten thousand dollars, if he could turn in a horse to pay towards the premium. I told Mr. Goodwin if there was a horse that suited me I wanted to buy a horse, and if this horse suited me I would take him, and give him a chance to get the balance. We went over and looked at the horse, I think that day or the next. I went over and saw the horse, and it was not such a horse as I wanted, and they talked about the price of the horse; I think the price was four hundred dollars. I told Mr. Hoffman I didn't want any such a priced horse as that, and I thought he had a big price on his horse. We went to talking then about some other matters. Any way it was a settled fact I didn't want to purchase the horse, and I went home. The next day or two after, I could not say as to that, I came in the

83 office one morning and Mr. Goodwin was there, and said he had the application *on* Mr. Hoffman. He said he had taken that horse himself, and said he knew some parties on whom he could turn that horse and make a good thing out of it. Said I, "Very well; if you have made an arrangement by which you can take that horse and turn it into this insurance premium, I am very glad." Said I, "It makes no difference to me, the money must be paid on the premium before the policy can be delivered." He said he could do it within thirty days; and on that the application was forwarded, and in due time the policy came back. I took the paper and policy and the blank note, and the receipt given in addition to the policy besides the note.

Q. See if that is the receipt, (handing paper to witness.)

A. That is the receipt, sir. I laid that in my own safe.

Q. That came with the policy?

A. Yes, sir. I laid them in my own safe, and the policy laid there for some time. In the mean time, Mr. Goodwin, I think, at the

84 time he brought the application, said he had the horse in his pos-

session; and, said he, "I want to show him to these parties at the City Hotel." I think he said some parties he had in view, and he wanted to get a buggy and harness to show the horse up. It was claimed that this horse was a fast horse. I told Mr. Goodwin I had a horse and buggy out on my place which he could have to show the horse around all he wanted to; and he said he would be very glad. And going home that night I rode the horse on horseback. The next morning I put him in my buggy and drove him in town and delivered him to Mr. Goodwin, and told him he might have the buggy and harness to use at his convenience. Some little time afterwards they were going out to the race-course to show the horse off, show how fast he could go, and they invited me along and I went along. On our return something occurred, that they were going to leave the horse where they were keeping him, somewhere on Scovil street; and as they drove to the stable Goodwin mentioned something about having
85 the horse put in there in my name. I said, "No, sir, no such thing; the horse might burn up; they would make me liable for the horse." Goodwin then remarked that he wanted him put in that way, for the reason that some of his creditors might take him away. I told him I could help that, and I objected to having the buggy and harness kept there; but I consented to it for a night or two. Mr. Goodwin said he hadn't any place to keep him, and I would take the horse out to my stable, and drive him in in the morning, and he could have him all day and show him all he wanted to; and that was continued for some time; it may be five or six weeks. They didn't succeed in selling the horse, however. The horse was offered to me, but I didn't want to buy the horse; and at last I had to go away, and I had no man there at my house to take care of the horse, and I told Mr. Goodwin he would have to make some provision for the horse, and I told him to take the horse, and he took the horse, and took him to Mr. Platt's stable,
86 and made arrangements with Mr. Platt to keep him. That is the last I saw of the horse or had anything to do with him.

Q. Now, you have got with your policy to the time it came back to the office with the enclosures. Go on from that time and tell what occurred with relation to it.

A. I think it was some six weeks, or nearly six weeks; I could not tell as to the time. The first time I knew anything about there was any papers passed between Mr. Goodwin and Mr. Hoffman binding the company, Mr. Hoffman came into my office one morning, and wanted to get his policy. I went to my safe to get the policy, and told him there was a premium on that policy to pay. He said he paid Mr. Goodwin. I said I could not help that; I hadn't received any pay. He went on to say how he had paid it, and said he had got a binding-receipt. I said, "I guess not;" and he said, "I have got one." I said, "I would like to see it." He said, "I have got it at my place of business."
87 I went right over with Mr. Hoffman to see this receipt. Mr. Hoffman went to his safe and took this receipt out; this receipt I have here. The receipt was written for nine-hundred and fourteen dollars and some cents. I said this receipt does not represent the premium on your policy. Mr. Hoffman said he didn't know anything about that. I said that is a very singular transaction—that you should receive a receipt for that amount, and don't know what you paid for it. He went on then to enumerate the horse and the debt he had given; that Goodwin owed him, and given his note for a hundred dollars at the bank, & was to give a premium-note when the policy come. I figured up the sum he mentioned, and it agreed with the

receipt, although it didn't agree with the premium on that policy, and I told him so, and he spoke also about this note he had given. Well, said I, I don't know anything about the note; I never saw it; Mr. Goodwin never told me he closed any bargain with you about
88 that horse. I went out with Mr. Hoffman to find that note, and we found the note in some bank here. I refused to give up the policy until I had received the pay of the premium. Could not do otherwise.

Q. Afterwards, what became of the policy?

A. The policy was returned to the company and cancelled.

Q. You heard Mr. Goodwin testify this morning?

A. Yes, sir.

Q. He said after you had been over there, you and he, to look at the horse, and you said it was too high price, and the next day or day or two after, you told him to go over there and close up the bargain and take the horse. State whether you ever told him to do any such thing.

A. I never did, sir.

Q. Something was said by Mr. Hamilton about having himself offered to sell you the horse, and your not wanting it, and then your going with him to some trade.

A. Mr. Hamilton came in, and I think Mr. Goodwin was with
89 him, and they was telling about they had a chance, if they had the money, to make a trade and turn that horse into cash. I told them if there was anything in the trade so that I would be made whole I would consent to it, and they explained to me what it was; that it was a house and lot, or vacant lot somewhere, and the man would take the horse, and I called and looked at it, and the price he had on the lot was such that I didn't think there was any show to get anything out of it. I wanted Mr. Goodwin to get through with it and make his commission on the policy.

Q. Mr. Hamilton, I believe, stated here that you paid for the keeping of the horse there. You may state how that was paid—what he produced, &c.

A. He produced an order from Mr. Goodwin, and I paid it, and charged it to Mr. Goodwin's account.

Q. You have given the conversation which occurred between you & Mr. Hoffman when he came after the policy?

A. Yes, sir.

90 Q. Did you tell Mr. Hoffman there was one hundred dollars more due on that policy, and if he would pay that one hundred dollars more due, he could have that policy? State whether any such conversation ever took place.

A. Never did. At some time after that, I did say to Mr. Hoffman, without prejudice to any suit which might be brought, that if he would take the horse back at two hundred and fifty dollars, I would stand the balance rather than to have any trouble with the company.

Q. You say Hoffman told you he had given the horse at $400, canceled that debt of $53, and given a note of $100, and was to give the premium note?

A. Yes, sir; was to give the premium-note of some amount.

Q. Who collected that hundred dollar note, if it was collected at all? Do you know anything about that?

A. I received nothing from it.

Q. Did you ever receive any proceeds from that horse?

A. No, sir.

91 Q. You say the last you know of him, he was left by Mr. Goodwin at Platt's stable?

A. Yes, sir.

Q. The premium-note, which it was said was given by Mr. Goodwin, you say you never saw?

A. I never did.

Cross-examination by Mr. Caldwell:

Q. You say that is your signature to that contract?

A. Yes, sir.

Q. The paper is in your handwriting?

A. Yes, sir.

Q. (By Mr. Terrell.) Did you put that stamp on there?

A. I did not.

Q. When was this paper drawn?

A. About the day it is dated there.

Q. You say you closed up your account after this arragement with Mr. Goodwin on the 7th day of June?

A. Well it was about that day. It might have been the 9th or 10th.

92 Q. After that you wasn't to pay him a hundred dollars a month?

A. No, sir.

Q. But barely commissions?

A. That is all.

Q. You stopped his monthly pay, and that is all the difference there was with what you did after that and before that?

A. No; he ceased to be any agent of mine. He was what we term a broker. If a man brings in an application I allow him so much.

Q. How many policies had he taken before you say you settled with him?

A. I could not say.

Q. How many did he take after the 7th of June?

A. I don't remember. I think not more than one or two. I would not say as to that.

Q. You say he was acting as your agent until the 7th of June. Now under what contract was he acting?

A. Well, he was acting in the first place—we agreed upon a contract—a basis of a contract upon which he would work.

Q. The contract was for two months?

93 A. No; the contract didn't specify the time. It was a contract I would make with him provided he could do as much business as he said he could do.

Q. And then you were to pay him a hundred dollars a month?

A. Yes, sir; I was to make a contract with him of no definite time.

Q. There is no definite time mentioned in this.

A. I have not read it over lately. I have forgotten just what it was.

Q. And you paid him for those two months the sum of $100 per month.

A. Yes, sir.

Q. When you settled up with him?

A. Yes, sir; when I settled up with him there was a balance due me. I had advanced him money from time to time.

Q. The only difference from that time until he ceased doing business for the company was that instead of your paying him by the month, he received a commission of 30 per cent. on the down premium.

A. No, sir; I didn't so understand it. He was out of my employ at the end of the two months. At that time I settled up with him.

94 Q. You no longer paid him $100 a month?

A. No, sir; I discharged him from my employ. He wasn't in my employ at all.

Q. How?

A. I would not deliver him the contract that I had agreeed to deliver to him if he had done the business he agreed to.

Q. You agreed to deliver him the contract when?

A. Whenever the time arrived that he should prove he could do the amount of business he represented he could do.

Q. What did you make the contract for and sign it at the time he commenced work?

A. That is the contract I agreed to make, and put it in my desk. There were two of those contracts, and they were both in the pigeonhole of my desk.

Q. Were they both drawn in his presence?

A. Yes, sir.

Q. And left there?

A. They were left there.

Q. Were they signed in his presence?

A. The copy was not signed at all.

Q. But this one was signed?

A. Yes, sir; it is signed by me.

95 Q. He occupied the office with you?

A. I don't know; he had the right to come in there.

Q. Did you have the desk?

A. No, sir.

Q. That is where he transacted his business?

A. Yes, sir; whenever he had any business he came in there.

Q. He had no other place of business you know of?

A. No, sir.

Q. When did you tell him he could not have this paper?

A. I don't know as I told him he could not have that at all. I gave him to understand if he didn't do more business——

Q. (Interrupting.) When did you first miss the paper?

A. I didn't miss it at all. I don't know anything about it at all; I saw it on the petition.

Q. Then it was left there for him?

A. No, sir; it was left there in my own private desk.

Q. It was left where he could get it?

96 A. No, sir; not unless he was searching where he had no business.

Q. What did you put that away for?

A. For the time to arrive when he could do the business he said he could.

Q. What was the talk between you as to when he was to have this paper?

A. He wasn't to have it until it was decided whether he was doing satisfactory business or not.

Q. It wasn't satisfactory?

A. No, sir; it was nowhere near satisfactory.

Q. You sent him to Jefferson?

A. I did in the first place.

Q. He worked about the city here, didn't he?

A. Yes, sir.

Q. Any other place?
A. I don't know of any other place.
Q. As your agent, ostensibly?
A. About here he did. He was in my employ after those two months.
Q. And at the end of those two months you settled up with him, and it was then agreed you would no longer pay him a salary, but he was to have a commission, and then he went right on taking policies
97 on the note; he went along, taking one or two, just the same as before?
A. No, sir; I don't think he did.
Q. What was the difference?
A. After that time, he wasn't in my office from that time for three weeks; so I was told.
Q. He come down there whenever he got an application for a policy for the John Hancock Insurance Company?
A. Yes, sir.
Q. He come there and transacted business with you?
A. Yes, sir.
Q. Who furnished him these blank applications?
A. I did.
Q. Did you have these blank premium-notes in your office?
A. No, sir.
Q. Had none about your office?
A. No, sir.
Q. Did you have any of these receipts about your premises?
A. Yes, sir.
Q. He had access to them?
98 A. No, sir; not without my consent.
Q. Did you refuse to let him have them?
A. I did.
Q. When he went to Jefferson did he have any such receipts?
A. No, sir.
Q. Did you have any?
A. No, sir.
Q. Did he ask you for any?
A. Yes, sir.
Q. You refused?
A. Yes, sir.
Q. How did he work it there?
A. The policies were collected by my agent there.
Q. When the policies were taken here, who receipted for the money?
A. I did.
Q. Didn't he ever give any?
A. I don't think he ever did.
Q. Do you swear he ever did?
A. He never by my consent.
Q. Didn't he bring money to you in several instances?
A. I don't think he did.
A. Did he ever bring you any property?
99 A. No, sir.
Q. Or checks?
A. No, sir.
Q. Or drafts?
A. I think he did. He brought a draft to me and took a premium payable to his own order.
Q. He was authorized to receive money?

A. O, well, I sent him back immediately and told him to get a paper payable to my order.

Q. When was that?

A. I don't recollect the date.

Q. Wasn't it after the 7th of June?

A. Well, I could not possibly say.

Q. He solicited policies and acted in the same way exactly to the 7th of June that he did before the 7th June?

A. I expect he did; yes, sir.

Q. Well, then, he was agent so far as he did act, wasn't he?

A. No, sir.

Q. Why not?

A. Because I didn't employ him.

Q. Didn't you give him permission to solicit insurance?

100 A. I gave him blanks the same as I would any other man. I didn't consider Mr. Goodwin was working for my company alone; I considered he was out in the field bringing in applications as other men do. I let him have blanks to do business with.

Q. When he returned these applications you took them just as you did before?

A. Yes, sir.

Q. And the policies were returned to you?

A. Yes, sir.

Q. And issued and delivered to the parties just as before?

A. Well, if my memory is correct I never gave him a policy to deliver.

Q. I have not asked that question; I say, you delivered the policies to the persons to whom they were issued the same as you did before?

A. I delivered them when I got the pay for them.

Q. He told you he had taken an application from this Mr. Hoffman?

A. Yes, sir.

Q. He handed it to you?

A. Yes, sir.

Q. You took it?

101 A. Well, it was lying on the desk there; I took it up and looked it over.

Q. What did you do with it?

A. I don't know whether I copied it on my application-book or the clerk did it.

Q. Then what did you do with it?

A. Forwarded it to the home-office.

Q. And in reply to that you received this policy back?

A. Yes, sir.

Q. Did anybody else have anything to do with soliciting this policy, except Mr. Goodwin?

A. I expect not.

Q. Anybody apply to Mr. Hoffman that you know of?

A. No, sir. I went over to see the horse. I didn't go over to apply for insurance.

Q. And only told you he could insure Mr. Hoffman if the horse could be taken?

A. Yes, sir.

Q. Hence you went over there on the day you stated to see this horse?

A. Correct.

Q. And then you saw Mr. Hoffman, and saw the horse, and the next day Mr. Goodwin brought the horse over to town?

102 A. I won't say whether it was the next day or not. I think a day or two elapsed.
Q. You took the horse out home the same day?
A. I took the horse and drove him home that night.
Q. How long did you keep him there?
A. Only over night. I drove him back and delivered him to Mr. Hamilton. They made some arrangements.
Q. You told Mr. Hamilton this was the horse you had taken of Hoffman on an insurance policy?
A. I did not, sir.
Q. You deny that, do you?
A. Yes, sir.
Q. Do you deny that you told Mr. Hamilton that that was the horse you had taken on an insurance policy?
A. I do, sir.
Q. Do you deny that you told him that the premium to pay for that insurance policy must come out of that horse?
A. Well, I could not say as to that. I might have told him something after that—that the money——
103 Q. (Interrupting.) No, but right there, when the horse was being kept by Mr. Hamilton, or when it was brought there, or when you was going out to see that house and lot?
A. No, sir; had no talk with Mr. Hamilton about it.
Q. You went with him and tried to sell the horse?
A. No, sir. I went up to see a house and lot we talked about trading for.
Q. What did you go to see the house and lot for?
A. If I could help Goodwin sell the horse I was willing to do it.
Q. When you had got the horse and taken him to Hoffman on this application?
A. I knew he had some arrangement with Mr. Hoffman on which he had taken him.
Q. You took that application to forward it to the company?
A. Yes, sir.
Q. Before you went to look at this house and lot you sent that application?
A. Yes, sir.
Q. You are not mistaken about that?
104 A. It had been forwarded.
Q. And with your knowledge, and under your direction?
A. Yes, sir.
Q. Then you knew at the time it was forwarded that this horse was in Goodwin's possession, and received of Mr. Hoffman as pay towards that policy, didn't you?
A. I did not.
Q. Do you swear that you did not?
A. I do, sir.
Q. What did you suppose he had it for?
A. Mr. Goodwin told me he was going to take the horse and get the money out of the horse to pay that premium. I told him if he had any arrangement by which he could sell that horse and get the commission and pay that premium, I was willing.
Q. Then you was willing to trust him for thirty days?
A. I didn't trust him anything about it.
Q. You had sent off the application?
A. Yes, sir.

Q. Why didn't you tell Mr. Hoffman that you didn't take horses on insurance?

105 A. I didn't see Mr. Hoffman until a long time afterwards. I had no idea there had been a binding contract anyhow.

Q. You swore Mr. Goodwin said in thirty days he could sell that horse and pay this premium that was going to the company?

A. Mr. Goodwin did say that.

Q. And after he said that, you sent on this application?

A. Yes, sir.

Q. And you knew that that horse was out of Mr. Hoffman's hands?

A. I knew Mr. Goodwin had him.

Q. Now tell where that that horse is.

A. I don't know.

Q. What was the last you did with him?

A. I drove him up to my house and to the office.

Q. Who did you turn him over to?

A. To Mr. Goodwin.

Q. What did you tell him to do with him?

A. I told him I didn't want any further bother with him. I had to go to the country and I didn't want to take care of him.

Q. Where was he at the time the policy came back from Boston?

106 A. I don't know exactly how long they kept him up at this stable. I judge the horse was up at Hamilton's stable at the time the policy came back; the policy came back within three or four days after the application went on.

Q. After the policy came back who did you tell the policy was there?

A. I don't remember telling anybody the policy was there. I put the policy in my safe.

Q. How long was it there before Mr. Hoffman came there for it?

A. I could not say. I know it was a long time.

Q. How long?

A. Well, I could not remember how long.

Q. You never had sent any word to him?

A. No, sir.

Q. By letter or any other way?

A. No, sir.

Q. Where was the horse when Hoffman came there for the policy?

A. Well, I could not say whether I was keeping the horse then, or
11 whether it was up at Mr. Platt's stable. It was one or the other.

107 Q. What did you say to Mr. Hoffman about taking the horse then?

A. I told Mr. Hoffman, without prejudice to any question in law, that if he would take the horse back for two hundred and fifty dollars, I would stand the balance.

Q. I mean at the time he came for the policy?

A. I told him there was so much premium at that time on the policy, and he said that he had paid Goodwin.

Q. How much did he say he had paid him?

A. He had paid him a horse, &c. I told Mr. Hoffman I could not deliver the policy until I had got the money.

Q. What did you tell him about the horse?

A. I don't remember.

Q. Did you say anything to him about the horse when he came after the policy?

A. O, I think there was something said about Mr. Goodwin having the horse.

Q. Did you tell him where the horse was?

A. I could not say now whether I did or not.

108 Q. Did you pretend to him you had nothing to do with the horse then?

A. I did, most assuredly.

Q. I will ask you if you didn't swear on the former trial, when Mr. Hoffman was a party himself, that you expected Hoffman to come and pay the difference between the horse and the premium, whatever that was, and that you thought the difference was a hundred and sixty dollars?

A. I don't think I swore to any such thing. If I did, it has slipped my memory.

Q. Didn't you hear Mr. Hoffman swear on the former trial, in the court of common pleas in the trial of the other place, that when he went to you for the policy, that you told him you must have another hundred dollars? Didn't you hear him swear to that?

(Objected to.)

Q. Did you not swear on that trial that you expected Hoffman to come and pay the difference, whatever the difference might be, and you thought it was a hundred and sixty dollars?

(Objected to. Allowed. Ex. by def't.)

109 A. I don't remember making any such statement.

Q. Did you not swear on that trial that you expected Hoffman to come and pay the difference between the horse and the premium, whatever it was, and that you thought it was a hundred and sixty dollars?

A. I don't remember the circumstances at all now.

Q. Did you pretend, on that examination, that he had not taken this horse?

A. I did.

Q. Now, you say you went with Mr. Hamilton for the purpose of seeing if this horse could be traded in towards a house and lot. Where was that house and lot?

A. I don't remember the street it was on.

Q. Did you talk of buying the house and lot?

A. No; I don't think I did.

Q. What did you go for?

A. I went up to see what the trade was. Mr. Hamilton was urging me to buy that horse, and I didn't want the horse.

110 Q. Tell us why you went and saw the house and lot?

A. I went up there with the idea if it was a good trade I would make a trade and turn the horse in for pay. If I could make such a trade as that and get out of it whole, I might have made it.

Q. Why did'nt you trade?

A. The trade wasn't such a trade as I thought would be desirable.

Q. You thought the man asked too much for the house and lot?

A. It must have been something of that kind.

Q. But you went for the purpose of helping to perfect the trade?

A. Something of that kind.

Q. How long was that after Goodwin had taken the horse?

A. It might have been a month or six weeks.

Q. It was after you had got the policy back?

A. Yes, sir.

Q. You were holding on the policy and helping him trade off the horse?

111 A. The policy was in my safe all the time.

Q. You say you hunted up this note when Hoffman came after his policy?
A. Yes, sir.
Q. You knew about the note before?
A. No, sir; I didn't know anything about it.
Q. Hadn't you told Mr. Goodwin to negotiate that note?
A. No, sir.
Q. Hadn't he dunned you for money?
A. Well, he was asking me for money a good deal of the time, but it was always in advance of his account.
Q. You wern't owing him?
A. I wasn't owing him.
Q. You owed him afterwards, didn't you; wasn't you owing him at the time he took this application of Hoffman's?
A. No, sir.
Q. He sued you and got a judgment against you?
A. He sued me; yes, sir.
Q. He got judgment for some two hundred dollars?
112 A. He got a compromise verdict with the jury.
Q. You say you paid for keeping this horse at Mr. Hamilton's?
A. I think I paid a bill; yes, sir; for keeping the horse.
Q. How much?
A. I don't remember the amount.
Q. Who paid the bill at Platt's?
A. I don't know.
Q. Don't you know you paid it?
A. No, sir; I never paid it.
Q. Now, you swear you don't know what became of that horse?
A. I do, sir.
Q. Did you ever give any order to take him away?
A. Never.
Q. Ever get him away?
A. No, sir.
Q. Don't you know what became of him after he went to Platt's?
A. No, sir.
Q. Didn't you take the horse to Platt's yourself?
A. No, sir.
Q. You swear to that, do you?
113 A. Yes, sir.
Q. Do you swear Mr. Goodwin went there with him?
A. I don't know that I would swear to it.
Q. Did you tell him to take him there?
A. No, sir.
Q. What did you mean when you swore the horse went to Platt's?
A. I meant to say I delivered the horse to Mr. Goodwin at the office there. I told Mr. Goodwin the day before that I was going away and something must be done to take care of the horse.
Q. What do you know about the horse going to Platt's; did you go there and get him?
A. No, sir.
Q. Did you use him while he was there?
A. No, sir.
Q. How many times did you use him while Mr. Hamilton had him?
A. I used him most every morning, I think. I drove him in from my house to my office.
Q. Where was he kept during the day?

114 A. I don't know where he was kept during the day. They had him driving around during the day to sell him.
Q. Who did you turn the horse over to during the day?
A. Mr. Hamilton would have him. Sometimes I might have him.
Q. Then you would have him nights and drive back.
A. Yes, sir.
Q. How long did you do it?
A. Three or four weeks.
Q. What other attempts did you make to try and sell that horse?
A. I don't know that I made any attempts to sell him.
Q. Where was Mr. Goodwin all this time you were driving this horse?
A. He was in and out my office.
Q. Made it his headquarters there?
A. Well, I don't know.
Q. He had no other place of resort?
A. I don't know how that was.
Q. You know of no other insurance business he was in, except that?
A. No, sir.
115 Q. You always hitched the horse there by your office.
A. I hitched him there and across the street.
Q. You took him to Hamilton's barn sometimes?
A. I never took him there.
Q. Somebody else took him there?
A. Not from my office from any orders of mine.
Q. He was kept at Hamilton's for a while, and you paid for his keeping?
A. I never went to Hamilton's with him, only the time we was coming from the race-course that day.
Q. Where was he kept during the day?
A. Mr. Hamilton had the horse driving him around to sell him?
Q. Where did you find him when you wanted to go home nights? Was he hitched up and brought and hitched to the post waiting for you?
A. I could not say.
Q. How much of the bill did you pay Mr. Hamilton?
A. I don't remember what that was.
Q. About how much?
116 A. I think it was seven or eight dollars.
Q. How come you to pay for it?
A. He brought an order from Mr. Goodwin to pay for it. I paid the order and charged it to Mr. Goodwin's account.
Q. The account as an agent?
A. I charged it up to his account.
Q. The same old account you had before?
A. The same old account. There was a balance.
Q. You kept right on in the same book?
Q. Kept it together, and charged this other to him as so much pay for him?
A. Yes, sir.
Q. Did you pay Platt?
A. No, sir.
Q. Did he ever call on you?
A. Yes, sir.
Q. You didn't pay it.
A. He came to the office and enquired for Mr. Goodwin. I told him I didn't know where he was.

Q. He had an account against you for keeping that horse?
A. No, sir, not to my knowledge.
Q. Didn't he call on you for pay?
117 A. No, sir; he called to see Mr. Goodwin; he was very much troubled to know how he was going to get his money.
Q. How many times did Mr. Hoffman ever come for his policy?
A. I never knew but once.
Q. At the time he did come, did you tell him where his horse was?
A. Well, I don't remember what I did tell him about that.
Q. Did you tell him he could have his horse back? Or did you ever tell him that when the time you told him if he would take the horse back at two hundred and fifty dollars it should be settled and all straightened?
A. Well, I don't remember as to that, sir.
Q. Now, when was it you told him that you would stand the balance if he would take the horse back at two hundred and fifty dollars?
A. Well, that was some time towards the last transaction. I don't remember as to the time, but it was some time when he threatened to sue the company.
Q. It was while you had this policy?
118 A. I could not say whether that policy had been returned or not.
Q. This policy wasn't returned until the 5th of February, 1870; now, was it before that or afterwards that you told Mr. Hoffman that if he would pay the balance in money and take the horse back at two hundred and fifty dollars it should be all straight?
A. I could not give the date of that. I could not say as to that.
Q. Your proposition was this, wasn't it: that if he would take the horse back, and call it two hundred and fifty dollars with the rest, you would assume and make it all right?
A. I told Mr. Hoffman rather than to have any trouble about this thing, as I said before, without any prejudice, if he would take that horse back at two hundred and fifty dollars I would stand the balance of the loss myself.
Q. This was after you knew the note had been bought?
A. I knew the note had been negotiated.
Q. How did you expect to stand the balance after the two hun-
119 dred and fifty dollars was taken out?
A. Because I would stand the loss rather than to have the trouble.
Q. How stand it?
A. I would pay the difference, settle with the company for the balance, and nothing further said about it.
Q. Then the policy had been returned, had it?
A. Well, I don't know about that.
Q. Do you swear to the court you don't know whether the policy had been returned or not?
A. I will.
Q. Do you swear you offered to assume the balance if he would take the horse back at two hundred and fifty dollars?
A. Yes, sir.
Q. That could not have been done after the policy had been returned and cancelled?
A. Yes, sir. I could have written to the company and had the policy written up again.

Q. And that was your object, was it, after the policy had been returned?

A. If it had been returned I would have done that, and closed the whole matter up.

Q. But if it hadn't been returned you would have delivered the policy right up?

120 A. Yes, sir; if he agreed to that proposition.

Q. What did you make such a proposition to him for if you never had anything to do with that horse?

A. Well, there was several reasons why I made that proposition.

The plaintiff puts in evidence the policy in question, notes, and blank receipts. (Copy of policy attached to def't's answer.)

Q. by Mr. TERRELL: What did I understand you to say about the amount of that receipt when you saw it first?

A. The amount had been changed from what it was when I first saw it in Mr. Hoffman's hands. It was nine hundred and fourteen dollars and some cents. It is now nine hundred and twenty-two dollars, which is the amount the policy called for.

Defendant rests.

PLAINTIFF'S REBUTTAL.

A. C. GOODWIN, being recalled on behalf of the plaintiff, testified as follows:

121 Q. Where was the last you ever saw of that horse?

A. It was in front of Mr. Thayer's office.

Q. What rig was attached to him then?

A. Mr. Thayer's buggy.

Q. State whether you did or did not take him to Mr. Platt's.

A. I did not.

Q. State, if you know, what became of the horse.

A. I don't, any more than what I was told by outside parties. I went in the country about the 20th of September. The horse was here at the time with Mr. Thayer.

Q. You didn't, then, take him anywheres from where he was in front of Mr. Thayer's office?

A. No, sir.

Cross-examination.

Q. Did you ever make any contract with Mr. Platt in relation to the horse?

A. No, sir.

Q. Didn't make any contract with him for fixing him up and driving him and showing him off?

A. No, sir.

Q. Do you know where Platt is?

A. No, sir; perhaps Mr. Thayer knows.

122 Testimony closed.

Authentication of testimony.

It is hereby stipulated and agreed between the parties named in the cause therein mentioned that the foregoing is the oral testimony given on the trial of said cause in the circuit court of the United States for the northern district of Ohio, and reduced to writing by Benjamin

Weaver, stenographer, and that the same should be incorporated into, and form a part of, the record of said cause as evidence therein.

CADWELL & MARVIN,
Pl'ff's Att'ys.
WILLEY, TERRELL & SHERMAN,
Def't's Att'ys.

The defendant's counsel offered in evidence the record of the case of Frederick Hoffman *vs.* The John Hancock Life Insurance Company, from the Cuyahoga common pleas, it being agreed that that case was brought to recover the premium alleged to have been paid for the policy in suit here.

Received subject to exception.

123 The following depositions of George P. Sanger and George B. Ager was read in evidence by defendant's counsel, (the deposition of George B. Sanger subject to exception,) which are in the words and figures following, to wit:

DEF'T'S DEP'S.

Depositions of sundry witnesses taken before me, Francis L. Hayes, justice of the peace within and for the county of Suffolk, in the Commonwealth of Massachusetts, on the 17th day of May, 1872, between the hours of eight o'clock a. m. and six o'clock p. m., at the office of the defendant, at Boston, in said county, pursuant to the annexed notice, to be read in evidence on behalf of the defendant in action pending in the U. S. circuit court for the northern district of the State of Ohio, in which Henrietta Hoffman is plaintiff and the John Hancock Mutual Life Insurance Company is defendant.

G. P. Sanger.

GEORGE P. SANGER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows, viz:

124 My name is George P. Sanger. I am fifty-two years old. I reside in Cambridge, in the Commonwealth of Massachusetts. My place of business is in Boston, in said Commonwealth. I am president of the John Hancock Mutual Life Insurance Company, and have been so since the company was organized in A. D. 1862.

(At this point, viz, 4 o'clock p. m., May 17, 1872, the further taking of this deposition was adjourned to ten o'clock a. m. of to-morrow, the 18th day of May, 1872, at the same place, by the request of the witness, in order to give the said plaintiff further time in which to appear, and take part in said examination, should he see fit to do so.

FRANCIS L. HAYES, *Magistrate.*

The further taking of this deposition was continued Saturday morning, May 18th, pursuant to adjournment, the said George P. Sanger continuing his testimony as follows, viz:

This company was transacting business in the State of Ohio during the year A. D. 1869. Justin E. Thayer was the general agent of this company in Cleveland, Ohio, during the year 1869, to procure
125 and effect insurance on the lives of individuals, and to collect and pay over premiums on such insurance when effected. He had no authority to make, alter, or discharge any contract or waive any

forfeiture. On the 11th day of August, 1869, we received from him a letter, of which the following is a copy, with an application for insurance on the life of Frederick Hoffman.

Letter of Thayer to def't.

(Copy.)

"CLEVELAND, *Aug. 9th*, 1869.

"Hon. GEO. P. SANGER,
"*Boston, Mass.*

"DEAR SIR: Herewith I hand you proposal, $52. Hoffman, 10-year endowment. The note is a little large for the kind of policy, but he says he will change it to all cash next year. The medical certificate will go for'd with other appl'ns to-morrow.

"Yours, respectfully,

"J. E. THAYER."

The medical certificate reaching us on the 13th of August, and the risk appearing to be a satisfactory one, the policy No. 8995 in this company, upon the life of Mr. Hoffman, was written and sent to Mr. Thayer by the mail of that day. The application, a copy of which is
126 hereto annexed, was in the usual form, and the policy written in due course. The name of A. C. Goodwin appears on the application, but only as a witness to the signatures of Mr. & Mrs. Hoffman. Mr. Goodwin was not then, nor had he been, an agent of this company, nor did we know, until the October following, (1869,) when the peculiar circumstances connected with the procuring the application above referred to were for the first time made known to us, that Mr. A. C. Goodwin had anything to do with procuring the application. Whatever he did for Mr. Thayer personally, he was never an agent for the John Hancock Mutual Life Insurance Company in any form.

This deponent, and, to the best of his knowledge, information, and belief, none of the officers of this company had, in any form, any knowledge of the arrangement between Mr. Goodwin and Mr. Hoffman as to taking a horse or any other thing in payment of the cash portion of the premium on his policy, nor that Mr. Goodwin had anything to do with the procuring the application until after the middle of October, 1869. The application was sent in the usual form, and
127 called for the payment of the premium partly by cash and partly by note, and this deponent, and, to the best of his information and belief, the other officers of this company, had no knowledge or expectation that the cash portion of the premium was to be paid in anything else but cash. This company does not receive, and has never received, anything but cash for the cash portion of the premiums of policies, except that occasionally, (the written consent of the company having been previously obtained therefor,) when the premium is all cash, that is, when there is no premium note, a short promissory (not a premium) note has been taken for a part or the whole of the cash; but in no case has this company ever received, in payment of premiums, anything but cash or note, nor has it ever authorized any of its agents to do so, nor have any of its agents ever done so with the knowledge and consent of the company. The present case is the first case within the knowledge of this deponent, and of the officers of the company, in which it was attempted to pay anything but cash or short note
128 for the cash portion of the premium; and the company declined to

acknowledge or recognize or assent to the transaction with said Hoffman in any form, and refused to receive anything but cash for the cash portion of the premium. This company never received from Mr. Thayer or Mr. Goodwin, or from any one else, any premium upon the policy of Mr. Hoffman, and never allowed to Mr. Thayer or Mr. Goodwin, on any one else, any commission on premium on said policy, and, no premium having been paid upon the policy, it was returned, in the ordinary way of business, by Mr. Thayer, and cancelled, and entered on our books as "not taken." Mr. Goodwin, not being an agent of the company, had no authority to give a binding receipt under any circumstances. If he had been an agent he would have had no authority to give a binding receipt except upon the receipt of the premium in cash, if the premium was all cash, or upon the receipt of the cash part of the premium in cash, if the premium was payable partly by cash and partly
129 by premium note. No agent has, or has had, authority to give a binding receipt except upon the payment of the cash part of the premium in cash, nor has it ever been done with the knowledge or consent of the company. The officers of this company had no knowledge that a binding receipt had been given in the Hoffman case until after the middle of October, 1869. There was nothing in the application, or in the letter of J. E. Thayer accompanying the same, (letter hereinbefore given, and application attached,) to indicate that such a receipt had been given.

GEO. P. SANGER.

(At 3 o'clock p. m. the further taking of said depositions was adjourned to ten o'clock in the morning of Monday next, the twentieth of May, A. D. 1872.

FRANCIS L. HAYS, *Magistrate.*

G. B. Ager.

On Monday, May 18, 1872, pursuant to adjournment, GEORGE B. AGER, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows, viz:

My name is George B. Ager; my age is forty-five; I reside in West Roxbury, in the county of Norfolk and Commonwealth of Massachusetts. My place of business is in Boston, in said Commonwealth; I am secretary of the John Hancock Mutual Life Insurance Company,
130 and have been so since the organization of the company in 1862.

I have read the foregoing deposition given by the president of the company, George P. Sanger, and the facts therein stated are true to the best of my knowledge, information, and belief. The rules for the payment of premiums are correctly stated by the president in his deposition, and they have been conformed to by the company, uniformly, since its organization; also the rules, as testified to by him, in regard to the taking of conditional or binding receipts.

Mr. A. C. Goodwin never was an agent for this company. It is my duty to receive the names of all persons who are to act as agents for this company, and transmit them to the insurance departments of the several States, for the purpose of procuring certificates of authority for them to act as such agents. I never received the name of A. C. Goodwin, and to the best of my knowledge and belief his name was never transmitted to the insurance department of Ohio, nor was a certificate of authority ever issued by said insurance department to said
131 Goodwin. Mr. A. C. Goodwin was never employed to act for or

in behalf of this company in any capacity, nor has anything ever been paid said Goodwin by this company for any services whatever, nor has this company ever authorized any other person to employ him or to pay him for any services. Subsequent to the middle of October, A. D. 1869, I first learned that A. C. Goodwin had assumed to act as agent for this company in the Hoffman matter, and to the best of my knowledge, information, and belief none of the officers of this company (prior to that date) had, in any form, any knowledge of the peculiar circumstances of the Hoffman case, or that Mr. Goodwin had anything to do with the matter. The facts testified to by the president in his deposition, in reference to the application of Hoffman and the letter of Justin E. Thayer accompanying the application, are correctly stated, and the copies forming a part of said deposition are correct copies. It is my duty, which is specially performed by me, to keep and audit the accounts of all the agents of this company. I have never received from Justin E. Thayer any payment for premium on the policy
132 No. 8995, on the life of Frederick Hoffman, dated Aug. 7, 1869, and he never was allowed or paid any commission on that policy, and said policy was returned by said Thayer (our general agent at Cleveland, in Ohio) as "not taken." I have never received any account whatever from A. C. Goodwin; have never received from him any payment of premiums on the Hoffman policy, or on any other, and never paid or allowed him any commissions or any other compensation for any services whatever. The premium on the Hoffman policy has never been paid to this company, or to any person authorized by this company to receive payment of premiums, and this company has never paid a commission to any person on the Hoffman policy. When said policy was returned to this company it was canceled by me on account of non-payment of the first premium.

GEO. B. AGER.

133 *Notice to take depositions.*

In the U. S. circuit court within and for the northern district of Ohio.

THE U. S. CIRCUIT COURT,
Northern District of Ohio:

HENRIETTA HOFFMAN, PLAINTIFF,
against
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Co., defendant.

The plaintiff will take notice, that on Friday, the 17th day of May, A. D. 18'2, the above named defendant will take the depositions of its officers & directors and sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of the defendant, in the city of Boston, county of , and State of Massachusetts, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

WILLEY, CARY & TERRELL,
Attorney for Def't.

I acknowledge service of the above notice by copy this 11th day of May, 1872, & we agree that the said depositions may be taken under the forms of our State courts below given.

Attorney for ———.

Instructions for taking depositions.

Begin with the following caption:

"Depositions of sundry witnesses taken before me" [here insert the name of the magistrate and his official character, as justice of the peace, notary public, etc.,] "within and for the county of , in the State of , on the day of , in the year , between the hours of a. m. and p. m., at , in said county, pursuant to the annexed notice" [or agreement, as the case may be,] "to be read in evidence on behalf of the" [plaintiff or defendant, as the case may be,] "in action pending in , in which plaintiff and defendant."

"A. B., of lawful age, being by me first duly examined, cautioned, and solemnly sworn" [or affirmed,] "deposeth and saith as follows, viz:" [here write the deposition,] and so on with all the witnesses.

The depositions may be taken by stating the facts in reply to questions first written down, or in the narrative form.

In Ohio they may be taken before a judge or clerk of the supreme court, common pleas or probate court, or before a justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, master commissioner, or persons empowered by a special commission. Out of Ohio by a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, commissioner appointed by the governor of Ohio to take depositions, or any person authorized by a special commission.

If there are adjournments they should be noted by the magistrate, or other officer, from day to day, at the close of the day.

Objections should be entered to witnesses supposed to be interested, and to questions supposed to be illegal. This entry is made on behalf of the party raising the objection, simply by a short note made by the magistrate, or officer taking the depositions.

Each witness must sign his own deposition.

The notice must be attached to the depositions and inclosed with them.

The depositions must be commenced on the day named, and some portion of a deposition taken on each successive day, Sundays excepted, adjournments being from Saturday to Monday; Sundays and national holidays not being regarded.

When depositions are taken under an agreement, the above instructions will be followed, except where they are modified by the agreement. In such cases the agreement will be followed. It should be attached to depositions if sent, and referred to in the caption, as the notice is when taken under a notice.

If taken by interrogatories and cross-interrogatories, under agreement or otherwise, every interrogatory and cross-interrogatory must be put to each witness, and answered so far as he can answer it, and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered.

The fees for taking the depositions should be taxed, and a memorandum made by whom they were paid. Close the depositions with a certificate in the form following, viz:

"I, A. B.," [naming the official character of the magistrate according to the fact,] "do hereby certify that" [naming all the witnesses who have testified] "were by me first severally sworn" [or affirmed] "to

testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by myself" [or if by any other person, name him and say, "by , who is not interested in the suit, in my presence and"] "in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice" [or agreement] "specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit;" [if there be adjournments, add] "and were commenced at the time in the notice specified, and continued by adjournment from day to day, as above stated."

In testimony whereof, etc.

(Signed) "A. B."

If the depositions are taken before a mayor, notary public, or commissioner, appointed as aforesaid, they must be certified under his official seal. If before any of the other officers above named a certificate must be annexed under the seal of the court of the county, or the great seal of the State, that the officer before whom the depositions were taken was, at the time of taking the same, such officer as he represents himself to be in his certificate. This should be attached to the magistrate's certificate.

This proof of official character is omitted when waived by agreement of the parties at the foot of notice. This agreement does not waive the taking them at the time and place named in the notice.

The whole should be sealed up by the magistrate, the title of the suit indorsed on the outside, the name of the officer taking the same, and "Deposition on behalf" [the party taking the same,] and addressed to the clerk of the . Let the magistrate also indorse: "These depositions sealed up, addressed, and transmitted by me," and sign his name to such indorsement.

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135 *Application for insurance in the John Hancock Mutual Life Insurance Company. Office, "Sear's building," Washington, corner Court street, Boston.*

(N. B.—These blanks are not to be filled:)

Date ———, 18—. Kind of policy, ———. Amount, $———. No.—. Age, ——. Annual premium, $——. Payable ———. Cash, $——. Note, $——.

This applicant, Frederick Hoffmann, of Cleveland, county of Cuyahoga, State of Ohio, proposes to insure the life of himself, of Cleveland, O., with the John Hancock Mutual Life Insurance Company, to the amount of eight thousand dollars ($8,000.00) for the period of ten years, endowment, and thereby become a member of said company, and with that view, and as the basis of such insurance, makes the following statements, which it is hereby mutually agreed shall form a part of the contract:

1. Full name & residence of the person for whose benefit insurance is applied for; relationship to the insured.—Henrietta Hoffman, Cleveland, Ohio. Wife. To revert to Frederick Hoffman in case of her death before his.

2. Is the premium to be paid annually, semi-annually, or quarterly?

If with loan it must be paid annually. Answer "Yes" under appropriate columns.

Annually.	Semi-annually.	Quarterly.	Loan note.	Five, ten, fifteen, or twenty annual pay'ts.
Yes.			40 per cent.	Ten.

☞ Are your dividends to be applied to increase your insurance, or to reduce your premiums?

Forwarded and recommended by—
(Signed)
J. E. THAYER,
Agent at Ohio.

3. Place and date of birth of the person whose life is proposed. State the year, month, and day.—Germany. November 1, 1832.

4. Age next birthday.—Thirty-eight years, (38.)

5. Occupation.—Manufacturer.

Married or single?—Married.

6. Weight.—180 lbs.

Height.—5 feet 8 inches.

General state of health.—Good.

7. Have you ever had any of the following diseases or infirmities? If so, state which, how recently, and give the full particulars: Apoplexy, asthma, coughs, prolonged disease of the brain, disease of the heart, disease of the lungs, disorder of the liver, diseased bladder, diseased kidneys, dizziness, dropsy, diarrhœa, dysentery, dyspepsia, erysipelas, fistula, fits, gravel, headache, insanity, pain in back, paralysis, palpatation, piles, rheumatism, rupture, spine complaint, spitting of blood, varicose veins, yellow fever?—None of these.

8. Have you had any serious illness, local disease, or personal injury; if so, of what nature & when?—No.

9. Have you been vaccinated?—Yes.

10. Are your habits of life correct and temperate, and have they always been so?—Temperate.

11. Have you been in the military or naval service? If so, were you wounded or injured?—No.

12. Have you ever resided out of the United States? If so, where and and for what period?—17 y'rs, in Germany.

13. Have you ever been examined for life insurance? Has any life insurance company declined to grant a policy on your life? If so, what co. & for what reasons?—No.

14. If now insured, state what company or companies, the amount, and for what period in each?—Mutual Life, $2,000; Conn. Mut., $3,000; Mass. Mut., $5,000.

15. Name & residence of your usual medical attendant.—Has none for self. Never sick.

16. Age of your parents, if living?—Father dead — years; mother dead — years.

Age attained by grandparents?—From 80 to 90 years.

17. Age of your brothers and sisters, if living?—5 brothers, 21 to 36 years; 4 sisters, 16 to 25 years.

136 18. At what age, and of what disease, have both or either of the parents died?—Father's age, 67; cause of death don't know; died in Germany. Mother's age, 49; cause of death, change of life.

19. At what age, and of what disease, have any of your brothers or sisters died?—Brother's age 4; cause of death, infancy.

20. State of health of the surviving parents, brothers, and sisters.—Very good.

21. Has your family been subject to any hereditary disease?—No.

22. Name and residence of a friend to whom the company can refer.—John Drum, Cleveland, Ohio.

23. Have you carefully read the above questions and answers thereto?—Yes.

The foregoing are full, fair, and true answers to the questions proposed.

Dated at Cleveland on the 7th day of August, A. D. 1869.

(Signed) HENRIETTA HOFFMAN,
Applicant.
FRED. HOFFMAN,
Person whose life is proposed.

Witness:
A. C. GOODWIN.

(It is important that the agent should see that all questions are specifically answered in order to prevent delay.)

Medical examiner's certificate.

Examination of Mr. Frederick Hoffman, Cleveland, Ohio.

1. Please to state—

(*a.*) General aspect, robust? Weak? Fat? Thin? &c., as generally indicating, at a glance, either good, bad, or indifferent constitution.—Ans. Robust and healthy.

(*b.*) Temperament, bilious, nervous, lymphatic, sanguineous, phlegmatic, melancolic, &c.—Ans. Lymphatic.

(*c.*) Chest, form, girth, (over nipples.)—Ans. Form, fair. On deep expiration, 37 inches; on full inspiration, 40 inches.

(*d.*) Respirations, the number per minute, and character of same.—Ans. 17.

(*e.*) Condition of lungs, on examination by percussion and auscultation.—Ans. Good.

(*f.*) Heart, the sound, rhythm, impulse, &c.—Ans. Normal, clear, distinct.

(*g.*) Pulse, rate per minute when not unusually accelerated, and character of the same; hard or soft, full, strong, or feeble.—Ans. 72.

(*h.*) Girth of waist.—Ans. 41.

(*i.*) Is there any indication of disease in liver or other abdominal organs?—Ans. No.

2. Is there anything in his or her form, or general appearance, indicating irregular habits, feeble constitution, or predisposition to disease?—Ans. No.

3. Has either of the parents, or have any of the paternal or maternal grandparents of the proposed life, or any of their descendants, so far as known, had consumption or asthma, or heart disease, or apoplexy, or been affected with insanity or mental derangement, and, if the latter, please to state the kind, degree, duration, & effects on health.—Ans. No.

4. (*a.*) Please to state whether, in your judgment, the constitution, diseases, and state of health, present or past, of his or her parents, or near relatives, are unfavorable to the risk.—Ans. No.

(*b.*) Which parent does he or she resemble?—Ans. Father.

5. Have you carefully questioned the person examined concerning the diseases and symptoms mentioned in question 7, and concerning the causes of death in his family, and are the statements given in reply apparently correct?—Ans. Yes.

6. Do you, acting in the interest of the company, consider the proposed life safely insurable; and do you advise that a policy be issued?—Ans. Yes, I do.

7. Is a reference to his or her medical attendant important?—Ans. No.

I hereby declare that I have given true answers to all the questions put to me by the medical examiner, and that I am the same person described in the accompanying application.

(Signed) F. HOFFMAN,
Person examined.

I hereby declare that I have attentively considered the application annexed, and carefully examined Mr. Frederick Hoffman. I have also witnessed the same person's signature as above.

(Signed) W. H. JONES, M. D.
Medical Examiner.

Dated at Cleveland, Ohio, Aug. 7th, 1869.

☞The examiner will please make himself familiar with the "Instructions to medical examiners," issued by the company, and put such further inquiries as he may think proper, and make such suggestions to the company respecting the risk as he may deem worthy of consideration.

Application No. 52. $8,000. On life of Frederick Hoffman, Cleveland.

137 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Superior court.

I hereby certify that Francis L. Hayes was at the time of the taking of the annexed deposition, and at the date of the within attestation was, and he now is, a justice of the peace within and for said county, duly commissioned and sworn; that due faith and credit are and ought to be given to his official acts, and that he is duly authorized to administer oaths and take acknowledgments, and that his signature is genuine.

Witness my hand and the seal of said court, at Boston, in said county and Commonwealth, this twentieth day of May, A. D. eighteen hundred and seventy-two.

[SEAL.] JOS. A. WILLARD, *Clerk.*

[5 ct. rev. stamp.]

I, Francis L. Hayes, a justice of the peace duly appointed within and for the county of Suffolk, in the Commonwealth of Massachusetts, do hereby certify that the within-named George P. Sanger and George B. Ager were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing
138 by myself in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified; and that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit. Said depositions were commenced at the time in the notice specified, and continued by adjournment from day to day as above stated.

In testimony whereof I have hereunto set my hand this twentieth day of May, A. D. 1872.

FRANCIS L. HAYES,
Justice of the Peace.

138½ PLAINTIFF'S PROOFS.

The following are the proofs offered in evidence by the plaintiff, to wit:

Agreement between Thayer and Goodwin.

This agreement, made the seventh day of April, one thousand eight hundred and sixty-nine, between Justin E. Thayer, manager, of the first part, and A. C. Goodwin, of Cleveland, O., of the second part, witnesseth: That the said party of the second part agrees to work for said party of the 1st part in the capacity of solicitor for applicants for life insurance that will be satisfactory to the said party of the first part. The said party of the second part is to travel in the State of Ohio as necessity or the party of the first part may dictate. In appointing sub-ag'ts & medical examiners he is to follow the instructions of the party of the 1st part.

In consideration of such services the party of the 1st part agrees to pay said party of the second part one hundred dollars p'r ($100) month and his legitimate traveling expenses, also 10 % *ten per cent.* com's on the am't of premiums received from him each month, all of which
138¾ is to be paid at the end of each and every month. It is understood and agreed that all moneys received or collected are a fiduciary trust, and are to be paid over to the said party of the first part as soon as collected. Commissions accrue as the premiums are paid over in cash or vouchers therefor.

Cleveland, April 7th, '69.

J. E. THAYER.

Pl'ff's proofs. 139 The following are the proofs offered in evidence by the plaintiff, to wit:

Agreement between deft and Thayer. This agreement, made the second day of January, one thousand eight hundred and sixty-nine, between the John Hancock Mutual Life Insurance Company, of Boston, Mass., an incorporation incorporated under the laws of the State of Massachusetts, of the first part, and Justin E. Thayer, of Cleveland, in the State of Ohio, of the second part, witnesseth: That the said party of the first part doth hereby appoint the said Justin E. Thayer as agent of the said party of the first part, for the purpose of procuring and effecting assurance on the lives of individuals and securing applicants therefor, who shall be satisfactory to the said company, and for the purpose of collecting and paying over premiums on such assurance when effected.

This appointment is on the following terms and conditions, which are agreed to by each party hereto:

Commissions. 140 The compensation to be allowed said party of the second part for his services shall be as follows:

	For the 1st year of assurance.	For the 2nd & subsequent years of assurance.
	Per cent.	*Per cent.*
All policies not obtained through the instrumentality of said party of the second part, when the premiums are collected by him	.....	.....
On all first year's premiums	Thirty.	One per cent.
On all second year's premiums	.....	.....
On all third and subsequent renewal-premiums	.....	Five.
On all extra permits	Five.	Seven & one-half.
		.....

An office shall be furnished the said party of the second part, in the city of Cleveland, Ohio, at a rent not to exceed three hundred dollars ($300) per annum, with the necessary furniture and running-expenses thereof, not including clerk-hire.

The commission upon policies other than as above stated shall be fixed by the officers of this company. Commissions shall accrue only as the premiums are paid to the said company in cash or vouchers therefor.

As to premiums collected by others.

When premiums upon policies of said party of the second part are collected by other agents, the expense of collection, not exceeding one per cent., shall be deducted from the commissions to be allowed on said premiums, as before stated.

Continuance of commissions.

The above commissions shall continue to be paid to said party of the second part, his executors, administrators, or assigns, for the term of twenty-five years from the date of each policy respectively on such policies as may so long continue in force.

District.

Second. The district to be assigned said party of the second part shall embrace the State of Ohio.

Sub-agents and medical examiners.

Within said district said party of the second part shall have the right to appoint sub-agents and terminate such appointments; also to appoint medical examiners, subject to the approval of said company and to such rules as they may establish.

What expenses to be allowed.

Third. The necessary expenses for medical examinations, for postage, and for expressage upon documents, and exchange shall be paid by said company. Further, said company shall furnish to said party of the second part, at their own proper cost and charges, a reasonable supply of blanks and circulars to enable him to carry on his business as agent, as aforesaid. But no charges other than as herein stated, or as shall hereafter be allowed by special permission of said company, shall be paid by said company.

Prompt returns.

And the said agent shall promptly remit to said company all moneys collected by him on or before the fifth day of each and every month, making such deductions only as are herein allowed, and shall return, at the proper time, to said company, all uncollected policies and premium-receipts sent him for collection, and shall comply with all such reasonable rules as said company may have established, or shall hereafter establish, for the government of their agents.

All risks to be first offered to the John Hancock.

Fourth. The said agent shall act as the exclusive agent of the said John Hancock Mutual Life Insurance Company of Boston, so far as to give to the said company the preference of taking all such risks as he, the said agent, shall be able to offer to said company.

Extent of agent's authority.

Fifth. The authority of said agent shall extend no further than is above stated. He shall not make, alter, or discharge any contract, or waive forfeitures, and shall receive no further remuneration for any service than is above stated. All policy-fees and other moneys received by him shall be paid to said company.

Settlement of disputes as to commissions.

Sixth. The said agent shall be entitled to no commissions on insurance unless, in the opinion of the board of directors, the same were fairly effected through his instrumentality and by him introduced to said office; and in all cases where the claim of the said agent to said commissions is disputed by the officers of the company or by other agents or persons, the decision of the board of directors, expressed by a vote of the majority at any regular meeting, shall be binding and conclusive as to such claim.

State license.

The party of the first part shall pay all expenses incident to complying with State laws and licenses.

As to terminating contract.

This contract shall continue in force three years from date, except from neglect of duty on the part of the
144 party of the second part, but in no case shall the discontinuance of the contract effect the continuance of the renewals.

In witness whereof the party of the first part hath hereunto set its corporate seal, and the party of the second part hath hereunto set his hand and seal the day and year above written.

[SEAL.] THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,
By GEO. P. SANGER, *Pres't.*

Countersigned:
GEO. B. AGER, *Secretary.*

J. E. THAYER. [SEAL.]

Form of premium-note.

$. BOSTON, , 18 .

One year after date I promise to pay to the John Hancock Mutual Life Insurance Company, at their office, or their order, dollars, with interest, (the interest to be paid annually,) the said amount being for part of premium on policy No. of said company, on the life of . In case of non-payment of
145 this note the amount shall be deducted from said policy in case of death.

Policy No.

——— ———.

Law of Massachusetts under which defendant acts.

THE NON-FORFEITURE LAW OF MASS.

[CHAP. 186.]

AN ACT to regulate the forfeiture of policies of life insurance.

Be it enacted, &c., as follows:

SECT. 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this Commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the "combined experience," or "actuaries'" rate of mortality, with interest at four per centum

per annum. After deducting from such net value any indebtedness to the company or notes held by the company against the insured, which notes if given for premium shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

SECT. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount at six per cent. per annum of the premiums that had been forborne at the time of the death.

[Approved April 10, 1861.]

146 DEFENDANT'S PROOFS.

(*Note sent to Thayer with policy.*)

[John Hancock Mutual Life Ins. Co., Feb. 11, 1870.]

Policy No. 8995, J. E. T.

$369. BOSTON, *Aug.* 7, 1869.

One year after date I promise to pay to the John Hancock Mutual Life Insurance Company, at their office, or their order, three hundred and sixty-nine dollars with interest. (The interest to be paid annually.) The said amount being for part of premium on policy No. 8995 of said company on the life of Frederick Hoffman. In case of non-payment of this note the amount shall be deducted from said policy in case of death.

[The above note is erased in the original.—PRINTER.]

Receipt referred to in testimony of Thayer.

[John Hancock Mutual Life Ins. Co., Feb. 11, 1870.]

Cash prem.. $553 58
Note prem.. 369 00
Total .. $922 58

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

Policy No. 8995.] BOSTON, ——— 186–.

147 Received from Frederick Hoffman nine hundred and twenty-two $\frac{58}{100}$ dollars, first payment of premium on policy No. 8995. Not binding until amount named herein is paid and this certificate countersigned by Justin E. Thayer, general agent.

Not binding unless countersigned by ———, agent at ———.
———, *General Agt.*
———, *Agent.*

(Erased:) GEO. B. AGER, *Secy.*

——— ——— *General Agent.*

(Written across the face in red ink:) Policy canceled; premium not paid.

RECORD FROM CUYA. COM. PLEAS.

In the court of common pleas.

STATE OF OHIO,
Cuyahoga County, ss:

Petition.

FREDERICK HOFFMAN, PL'FF,
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, def'ts.

The plaintiff, Frederick Hoffman, complaining of the defendant, the John Hancock Mutual Life Insurance Company, a corporation having its headquarters at Boston, in the State of Massachusetts, and organized under the laws of said State, but doing business in Ohio, under &
148 by virtue of the laws of Ohio regulating such companies; for that on or about the 7th day of August, A. D. 1869, he made an application to said company, in writing, for an insurance on his life of $8,000.00, to be insured on what said company called the endowment plan of insurance; and for the purpose of securing to said company the payment of their first annual premium, in case said company should approve his application and should grant a policy of insurance on his life, plaintiff, at the request of the agent of said defendant, advanced the amount of said first annual premium to said company, to their satisfaction, and thereupon received from said company a receipt worded as follows, to wit:

Conditional receipt.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Cleveland, August 7th, 1869.

[2-ct. U. S. stamp. A. C. G. Aug. 7, 1869.]

Received from Frederick Hoffman the sum of nine hundred twenty-two dollars and fifty-seven cents, being the first annual premium on an insurance of eight thousand dollars on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual
149 Life Insurance Company, of Boston, the said insurance to date from August 7th, 1869, subject to the conditions and agreements of the policies of the said company, and provided that the said application shall be accepted by the said company, and a policy be by them granted thereon; the said policy, if issued, to be delivered by me when received to the holder of this receipt, which shall then be given up. It is expressly understood and agreed that if the above-mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt, but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up.

A. C. GOODWIN, *Agent.*

Plaintiff says he did not pay to said company the amount mentioned in said receipt in money, but as follows: 1st. At their request, one horse, for which they allowed him $400. 2d. His note in bank, which he has since paid, $100. 3d. He delivered up a note which he

held against A. C. Goodwin of $40.00—$40.00. 4th. He gave to the company his note for $382.57, which last note he understood was to be canceled by the dividends of the company, or something of that kind. He can only state his recollection, and it may not be correct. Plaintiff avers that he performed all that was required of him by said company, towards obtaining a policy, and that he took said receipt in good faith. That afterwards he was informed by the agent of said company that the company had granted him a policy, and directed to call at the office and get it. Plaintiff says that thereupon he called at the office of the company, in the city of Cleveland, and enquired of one in charge of said office, and whom plaintiff was informed was and is the general agent of said company in the city of Cleveland, if his policy had come, when said agent informed him it had come. Plaintiff thereupon demanded the same, when the said agent, acting for said company, told him he could have it by paying to him one hundred dollars more, or in addition to what he had already paid, which plaintiff declined to do. Plaintiff says that defendant, the John Hancock Mutual Life Insurance Company, in refusing to furnish to him a policy on his life according to their contract with him, have violated their contract, and by reason of their said violation of their said contract they have become liable to pay him the amount of said receipt, to wit, the sum of $922.50, and interest from August 7th, 1869, which sum is now due and owing from said defendant to this plaintiff, and remaining unpaid. Plaintiff, therefore, asks judgment against said defendant for the sum of $922.57, and int. from Aug. 7th, 1869, and that said defendants may, upon bringing into court and delivering to this pl'ff the note they now hold, for about the sum of $382.57, have the same applied to diminish said judgment to the amount of said note.

150 151

By ELWELL MARVIN,
Pl'ff's Atty's.

Frederick Hoffman, being duly sworn, says that the statements of facts contained in the foregoing petition by me subscribed are true so far as the same are stated of my own knowledge, and that those matters which are stated therein on information and belief are true according to the best of my knowledge and belief.

152

F. HOFFMAN.

Sworn to by the said Frederick Hoffman before me, and subscribed in my presence, this 3d day of December, A. D. 1869.

GEO. HESTER, *J. P.*

In the court of com. pleas.

STATE OF OHIO,
Cuyahoga County, ss :

FREDERICK HOFFMAN, PL'FF,
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, def't.

Issue summons returnable according to law. Am't claimed, $922.57, & int. from Aug. 7th, 1869. Endorsed: For money only.

EDWIN & MARVIN, *Pl'ff's Att'ys.*

To the CLERK OF THE COURT.

(Endorsed:) "Petition for money only." Filed and sum's issued Dec. 4th, 1869.

153 *Summons, (secs. 57, 59.)*

THE STATE OF OHIO,
Cuyahoga County, ss:

To the sheriff of Cuyahoga County:

You are commanded to notify John Hancock Mutual Life Insurance Company that it has been sued by Frederick Hoffman in the court of common pleas of Cuyahoga County, and that unless it answer by the first day January, A. D. 1870, the petition of the said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 13th day of December, A. D. 1869.

Witness Frederick S. Smith, clerk of said court, and the seal thereof, at the city of Cleveland, this 4th day of December, A. D. 1869.

[SEAL.] FREDERICK S. SMITH, *Clerk.*
By H. CLAY WHITE, *Deputy Clerk*

Returnable 2d Monday after issued. Ans. by 3d Saturday after return-day. (Issued to other county, sec. 59. Injunc. sec. 243.)

154 On the 11th day of December, 1869, I served this summons by delivering a true & certified copy thereof to J. E. Thayer, resident agent of the John Hancock Mutual Life Insurance Company, for said company, its principal office being located out of the State of Ohio.

JOHN U. FRAZEE, *Sheriff,*
By GEORGE RIDGWAY, *Deputy.*

THE STATE OF OHIO,
Cuyahoga County, ss:

Sheriff's fees: service, 40; copy, 35; mileage, 50; return, 25—$1.50.

(Indorsed:) No. 516, doc. 36, page 59. Cuyahoga common pleas. Frederick Hoffman *v.* John Hancock Mut. Life Ins. Co. Summons in action for money only. Am't claimed, $922.57, for which, with interest thereon from August 7th, 1869, judgment will be taken if you fail to answer. Returnable Dec. 13, 1869. Elwell & Marvin, plaintiff's attorneys. Returned and filed Dec. 13th, 1869. Received Dec. 6th, 1869, 2 p. m. John U. Frazee, sheriff.

155 *Answer.*

Court of common pleas.

THE STATE OF OHIO,
Cuyahoga County, ss:

FREDERICK HOFFMAN, pl'ff,
vs.
THE JOHN HANCOCK MUTUAL LIFE INS. CO., defendant.

And now comes the said defendant, and in answer to plaintiff's petition denies that said plaintiff at the request of defendant advanced the amount of the first annual premium to said company to their satisfaction, and thereupon received from said company the receipt set forth in said petition, as said plaintiff in his petition has alleged. And said defendant denies that said A. C. Goodwin was, on the 7th day of August, 1869, the agent of said defendant, or in any manner authorized to act for the said defendant, or to make the contract set forth in said

petition. And defendant denies that said plaintiff has made the payment or any part thereof to said company as alleged in said pet itin for or on account of the premium upon the policy named in said
156 petition, or for any account whatever. And defendant denies that the general agent or any agent acting for said company told plaintiff that he could have the policy described in said petition by paying to said agent one hundred dollars more in addition to what plaintiff had already paid on said policy as alleged in said petition. Said defendant denies that it became and is liable to pay to said plaintiff the amount of said receipt or any part thereof, or that there is anything due from said defendant to said plaintiff. Said defendant further says that whatever said A. C. Goodwin has done by way of procuring a policy of insurance for said plaintiff was done by him on his own responsibility and without any authority from said defendant, and not as agent for said company, and that said defendant is in no way liable to said plaintiff for any contract which said A. C. Goodwin may have made with said plaintiff.

157 Wherefore defendant asks for judgment against the plaintiff.

WYMAN, BARLOW & CUTTER,
Deft's Atty's.

THE STATE OF OHIO,
Cuyahoga County, ss:

J. E. Thayer, being duly sworn, says that he is the general agent of the defendant, having his office in Cleveland, in said county; that said def't is a foreign corporation, and that he believes the facts set forth in the foregoing answer are true.

J. E. THAYER.

Subscribed by the said J. E. Thayer in my presence, and sworn to by him before me this 20th day of Dec., 1869.

FRED'K. S. SMITH, *Clerk.*

(Endorsed:) "Def't's answer." Filed Dec. 23, 1869.

Reply.

In the court of common pleas.

THE STATE OF OHIO,
Cuyahoga County, ss:

FREDERICK HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE INS. CO.

And now comes the said plaintiff, and, replying to the answer
158 of the defendants in this behalf, denies that the said A. C. Goodwin was acting without authority from said defendant; and he says that he was not only acting for said defendant, but said defendant fully adopted all that he did in the matter, and granted a policy on his said application.

ELWELL & MARVIN,
Pl'ff's Att'ys.

Frederick Hoffman, being duly sworn, says that the statements of facts contained in the foregoing reply are true, as he verily believes.

F. HOFFMAN.

Sworn to before me and subscribed in my presence this 15th day of January, A. D. 1870.

GEO. HESTER, *J. P.*

(Endorsed:) "Reply." Filed Jan'y 21st, 1870.

Motion for a new trial.

In the court of common pleas.

STATE OF OHIO,
Cuyahoga County, ss:

FREDERICK HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE INS. CO.

And now, after verdict and before judgment, comes the defendant, and moves the court for a new trial of this cause, upon the fol-
159 lowing grounds, to wit: 1st. Because the verdict of the jury was against the weight of the evidence. 2d. Because the verdict of the jury was against both the law and the evidence. 4th. Because damages given by jury were excessive.

WYMAN & BARLOW, &
WILLEY, CARY & TERRELL,
Att'ys for Def'ts.

160 (Endorsed:) "Motion for new trial." Filed Nov. 25, 1870.

161 *Certificate of docket and journal entries.*

In the court of common pleas.

THE STATE OF OHIO,
Cuyahoga County, ss:

FREDERICK HOFFMAN
vs.
JOHN HANCOCK MUTUAL LIFE INSURANCE Company. } Money only.

Nov. term, 1869, (Dec. 4, 1869.) Pet. filed & sum's issued Dec. 13, 1869. Sum's ret'd served on J. E. Thayer, ag't, continued.

Feb'y 7, 1870, the parties, by their attorneys, come and are at issue. Whereupon a jury being called, came, to wit: James B. Wilbur, H. H. Powell, Wm. Engle, E. D. Battles, Henry Van Hyening, H. G. Seekins, Marcus A. Bard, John Kennedy, Ezra Honeywell, D. G. Branch, Henry Fish, and Stephen Brenuon, who, being duly empanneled and sworn the truth upon the issue joined between the parties, do upon their oaths say that said defendant does not owe said plaintiff as is alleged in the petition. It is therefore considered that said defendant recover of said plaintiff its costs of defense, to be taxed, and on the 15th day of March, 1870, said plaintiff demands a second trial of this cause, and the court being of opinion that the case is one in which a trial by jury may be demanded by either party, do allow a second trial thereof, upon said plaintiffs entering into an undertaking as provided by law in the sum of two hundred dollars.

Ap'l 14, 1870, un'd for 2nd trial by pl'ff in $200. A. Elwell & C. C. Briggs, sureties.

May term, 1870, by consent of parties this cause is continued.

Nov. term, 1870, the parties by their attorneys come and are at issue, whereupon a jury being called, came, to wit: Adam S. Meech, J. D. Pereira, Lewis Schwaub, Wm. Richards, N. C. Hills, Erastus Briggs, Buckley Steadman, Francis Davison, John Berg, L. D. Cottrell, Thomas James, and Noah Myrick, who, being duly empanneled and sworn the truth to

speak upon the issue joined between the parties, do upon their oaths say that said defendant does owe said plaintiff as is alleged in the petition, and assess the plaintiff's damages by reason of the premises at five hundred fifty-three and fifty-seven cents. And on the 25th day of November, A. D. 1870, after verdict, but before judgment, said defendant files its motion for a new trial of this cause, which motion is heard and granted on payment of the costs of this term by said defendant 12 days before the next term of this court.

Feb'ry term, 1871. This cause is abated by the death of the plaintiff.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Benjamin S. Cogswell, clerk of the court of common pleas in and for said county, do hereby certify that the above is a true transcript of the docket and journal entries of said court in the above-entitled cause.

Attest my hand and the seal of said court at Cleveland, this 31st day of October, 1873.

[SEAL.] BENJAMIN S. COGSWELL, *Clerk.*
By C. C. LOWE, *Deputy Clerk.*

162 (Indorsed:) Doc. 36, p. 59, Cuyahoga County. Hoffman *vs.* John Hancock M. L. Ins. Co. Certificate of journal entries.

163 *Certificate of common pleas record.*

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Benjamin S. Cogswell, clerk of the court of common pleas within and for said county, and in whose custody the files, journals, execution dockets, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the pleadings & process in the case of Frederick Hoffman *vs.* John Hancock Mutual Life Ins. Co., now on file in the office of the clerk of the court of common pleas within and for said Cuyahoga County; and that said foregoing copy has been compared by me with the original pleadings & process, and that the same is a correct transcript thereof.

In testimony whereof I do hereto subscribe my name officially and affix the seal of said court, at the court-house, in the city of Cleveland, in said county, this 31st day of October, A. D. 1873.

BENJAMIN S. COGSWELL, *Clerk.*
By C. C. LOWE, *Deputy Clerk.*

164 *Clerk's certificate to record.*

NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is a true copy of the record and proceedings of the circuit court of the United States within and for the sixth circuit and northern district of Ohio in the cause entitled in the caption thereof, and of all the testimony given on the hearing thereof in said court.

Witness my official signature and the seal of said court at Cleveland, in said district, this 11th day of December, A. D. 1873.

[SEAL.] EARL BILL,
Clerk of said Court.
By CHAS. H. BILL,
Deputy Clerk.

Motion for a new trial.

In the court of common pleas.

STATE OF OHIO,
Cuyahoga County, ss:

FREDERICK HOFFMAN
vs.
THE JOHN HANCOCK MUTUAL LIFE INS. CO.

And now, after verdict and before judgment, comes the defendant, and moves the court for a new trial of this cause, upon the fol-
159 lowing grounds, to wit: 1st. Because the verdict of the jury was against the weight of the evidence. 2d. Because the verdict of the jury was against both the law and the evidence. 4th. Because damages given by jury were excessive.

WYMAN & BARLOW, &
WILLEY, CARY & TERRELL,
Att'ys for Def'ts.

160 (Endorsed:) "Motion for new trial." Filed Nov. 25, 1870.

161 *Certificate of docket and journal entries.*

In the court of common pleas.

THE STATE OF OHIO,
Cuyahoga County, ss:

FREDERICK HOFFMAN
vs.
JOHN HANCOCK MUTUAL LIFE INSURANCE Company. } Money only.

Nov. term, 1869, (Dec. 4, 1869.) Pet. filed & sum's issued Dec. 13, 1869. Sum's ret'd served on J. E. Thayer, ag't, continued.

Feb'y 7, 1870, the parties, by their attorneys, come and are at issue. Whereupon a jury being called, came, to wit: James B. Wilbur, H. H. Powell, Wm. Engle, E. D. Battles, Henry Van Hyening, H. G. Seekins, Marcus A. Bard, John Kennedy, Ezra Honeywell, D. G. Branch, Henry Fish, and Stephen Brenuon, who, being duly empanneled and sworn the truth upon the issue joined between the parties, do upon their oaths say that said defendant does not owe said plaintiff as is alleged in the petition. It is therefore considered that said defendant recover of said plaintiff its costs of defense, to be taxed, and on the 15th day of March, 1870, said plaintiff demands a second trial of this cause, and the court being of opinion that the case is one in which a trial by jury may be demanded by either party, do allow a second trial thereof, upon said plaintiffs entering into an undertaking as provided by law in the sum of two hundred dollars.

Ap'l 14, 1870, un'd for 2nd trial by pl'ff in $200. A. Elwell & C. C. Briggs, sureties.

May term, 1870, by consent of parties this cause is continued.

Nov. term, 1870, the parties by their attorneys come and are at issue, whereupon a jury being called, came, to wit: Adam S. Meech, J. D. Pereira, Lewis Schwaub, Wm. Richards, N. C. Hills, Erastus Briggs, Buckley Steadman, Francis Davison, John Berg, L. D. Cottrell, Thomas James, and Noah Myrick, who, being duly empanneled and sworn the truth to

speak upon the issue joined between the parties, do upon their oaths say that said defendant does owe said plaintiff as is alleged in the petition, and assess the plaintiff's damages by reason of the premises at five hundred fifty-three and fifty-seven cents. And on the 25th day of November, A. D. 1870, after verdict, but before judgment, said defendant files its motion for a new trial of this cause, which motion is heard and granted on payment of the costs of this term by said defendant 12 days before the next term of this court.

Feb'ry term, 1871. This cause is abated by the death of the plaintiff.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Benjamin S. Cogswell, clerk of the court of common pleas in and for said county, do hereby certify that the above is a true transcript of the docket and journal entries of said court in the above-entitled cause.

Attest my hand and the seal of said court at Cleveland, this 31st day of October, 1873.

[SEAL.] BENJAMIN S. COGSWELL, *Clerk.*
By C. C. LOWE, *Deputy Clerk.*

162 (Indorsed:) Doc. 36, p. 59, Cuyahoga County. Hoffman *vs.* John Hancock M. L. Ins. Co. Certificate of journal entries.

163 *Certificate of common pleas record.*

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Benjamin S. Cogswell, clerk of the court of common pleas within and for said county, and in whose custody the files, journals, execution dockets, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the pleadings & process in the case of Frederick Hoffman *vs.* John Hancock Mutual Life Ins. Co., now on file in the office of the clerk of the court of common pleas within and for said Cuyahoga County; and that said foregoing copy has been compared by me with the original pleadings & process, and that the same is a correct transcript thereof.

In testimony whereof I do hereto subscribe my name officially and affix the seal of said court, at the court-house, in the city of Cleveland, in said county, this 31st day of October, A. D. 1873.

BENJAMIN S. COGSWELL, *Clerk.*
By C. C. LOWE, *Deputy Clerk.*

164 *Clerk's certificate to record.*

NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is a true copy of the record and proceedings of the circuit court of the United States within and for the sixth circuit and northern district of Ohio in the cause entitled in the caption thereof, and of all the testimony given on the hearing thereof in said court.

Witness my official signature and the seal of said court at Cleveland, in said district, this 11th day of December, A. D. 1873.

[SEAL.] EARL BILL,
Clerk of said Court.
By CHAS. H. BILL,
Deputy Clerk.

165 Know all men by these presents that we, Henrietta Hoffman as principal, and Martin Maurer as surety, are held and firmly bound unto the John Hancock Mutual Life Insurance Company in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made, we do hereby bind ourselves, our heirs and legal representatives, firmly by these presents. Sealed with our seals and dated this 18th day of September, A. D. 1873.

The condition of the above obligation is such that whereas the above bounden Henrietta Hoffman hath taken an appeal to the Supreme Court of the United States from a certain decree against her rendered by the circuit court of United States in a certain cause wherein the said Henrietta Hoffman is complainant, and the said John Hancock Mutual Life Insurance Company is respondent:

Now, therefore, if the said Henrietta Hoffman shall prosecute her said appeal to effect, and shall pay all costs and damages which may be adjudged against her therein, then this obligation shall be void, but otherwise to remain in full force and virtue in law.

HENRIETTA HOFFMAN. [SEAL.]
M. MAURER. [SEAL.]

Signed and sealed in presence of—

166 NORTHERN DISTRICT OF OHIO, *ss:*

I hereby certify that the foregoing is a true copy of the original appeal-bond filed in a certain cause lately pending in the circuit court of the United States within and for said district, wherein Henrietta Hoffman was complainant and the John Hancock Mutual Life Insurance Company was respondent; said bond now remaining on file in the clerk's office of said court.

Witness my official signature and the seal of said court at Cleveland, in said district, this 16th day of February, A. D. 1873.

[SEAL.] EARL BILL,
Clerk of said Court.
By CHAS. H. BILL,
Deputy Clerk.

(Indorsed:) 2312. U. S. circuit court, N. D. of Ohio. Henrietta Hoffman *vs.* John Hancock Life Ins. Co. Bond for appeal. Filed Sept. 18, 1873. Chas. H. Bill, dep. clerk.

(Also indorsed:) Sup. Court U. S., 1873, October term, No. 705. Henrietta Hoffman, appellant, *vs.* The John Hancock Mutual Life Insurance Company. Copy of appeal-bond. Filed 19th February, 1874.

(Indorsment on cover:) No. 705. Henrietta Hoffman, appellant, *vs.* The John Hancock Mutual Life Insurance Company. N. Ohio. C. C. U. S. Filed 12th February, 1874.

Supreme Court of the United States.

No. 705.---Present No. 148.

Henrietta Hoffman, Appellant,

vs.

The John Hancock Mutual Life Insurance Company.

BRIEF FOR APPELLANT,

BY

MARVIN, HART & SQUIRE.

CLEVELAND, O.

Of Connsel

Hon. J. A. Garfield.

Statement.

This cause comes into this Court by appeal from the Circuit Court of the United States for the Northern District of Ohio.

Appeal.

The Appellant at the time this Bill was filed in the Court below was a resident of the City of Cleveland, in the County of Cuyahoga, in said District, and first brought her action in the Court of Common Pleas of said County, and Appellee who is and was a resident of the State of Massachusetts—removed said Cause to said Circuit Court, when the same was heard and resulted in a decree adverse to Appellant, who now prosecutes her appeal.

Where App'llant resided

Suit Commenced,

Removal.

Decree.

Appeal.

Appellant is the Widow relict of one Fredrick Hoffman.

On the 2d day of January, A. D., 1869, Appellee apointed one Justin E. Thayer, of Cleveland, in the State of Ohio, an agent of said company, for the purpose of procuring and effecting assurance on the lives of individuals, and securing applicants therfor, who shall be satisfactory to the said company, and for the purpose of collecting and paying over premiums on such assurance when effected, and assigned him as his District or Territory, the State of Ohio; with power in said District to appoint sub agents, and terminate such appointments, also to appoint Medical Examiners, subject to the approval of the Company, etc. See Record page 55. This power was to continue for the term of three years.

Gen'l Agent. Record, Page 54,

Territory,

Record, 55.

Power of Appointment.

Term.

Thayer immediately entered upon his duties as such agent, and continued his agency until long after this cause of complaint arose.

Entered upon his Duties.

On or about the 7th day of April, 1869, Thayer appointed one A. C. Goodwin, as sub agent of said Company and sent

Goodwin enters into his Services.

him out to assist him in organizing his territory, appointing other sub Agents and Medical Directors, and for the purpose of soliciting Assurance, and for this purpose he supplied him with all needed and necessary blanks and authority.

August 7th, Still at work.

In the summer following and on the 1st and 7th of August, as well as for some time thereafter, Goodwin was soliciting insurance for said company, and in the prosecution of his business he officed with the said Thayer, and from his office and in said office transacted his business by procuring Life Insurance for said company.

Office paid for by the Company.

Thayer's office was the office of said company in Ohio, and was paid for by them. That, therefore, Goodwin acted as an agent of the company in their office with their knowledge and consent and with the knowledge of their General Agent, held himself out to the public and to all dealing with him or with said office that he was an agent of the Company.

Goodwin acted as Agent with the knowledge of the Company.

Thayer and Goodwin call on Hoffman.

Property Examined.

Application written up.

On the 5th or 6th day of August 1869, Goodwin having previously seen Fredrick Hoffman, took with him said Justin E. Thayer, the General Agent of the Company for Ohio, and went to see him in regard to the insurance for $8.000, upon the ten year endowment plan, and for the purpose of looking at some property which Hoffman proposed to turn out to the agent upon the first payment. That day Hoffman's terms were ascertained and the property was examined, but nothing further was done. On the 7th, Goodwin, as he says, acting directly under the instructions of Thayer, writes up the application in favor of Appellant, has Hoffman examined by the medical examiner of the company and receives of Hoffman the stipulated premium, and gives to him the Binding Receipt, Record, page 58, to which receipt special reference is made. And as in agreement he receives from Hoffman, in lieu of cash,

Binding or conditional Receipt given. Record, 58.

Payment made.

One horse for which they allowed him - - - -	$400.00
His notes for - - - - - - - - - -	$100.00
Canceled an indebtedness of - - - - -	$53.00
	$553.00,

Premium note delivered.

And executed and delivered to said Goodwin, a premium note for the sum of $369.00 for the balance of the premium—the premium being payable partly in note.

Goodwin returns the application to the office and delivers it to Thayer, the horse he delivers to Thayer, the Notes he applies on his commissions, as he says, under Thayer's instructions, and when it fell due Hoffman paid it. Thayer received the horse and kept it for a long time and finally disposed of it in some manner, how is not known. The application was forwarded to the Company and by them received and accepted and a policy was by the Company written up in favor of Appellant, and forwarded to the General Agent, said Thayer, at Cleveland, Ohio, to be by him countersigned and *delivered to Appellant.*

Horse and Application delivered to Thayer.

Thayer receives and disposes of it.

Policy written up.

Sent to Thayer.

This was never delivered, it was refused Hoffman—and Appellant.

Never Delivered.

The property was never returned to him, the money paid by him has never been refunded.

Property was not Returned.

The Company have the property or its avails and the money.

Fredrick Hoffman, during his life time, after the refusal of the company to deliver to him the Policy, or to refund to him his property and the money or its value, brought an action in the Court of Common Pleas of said County, to recover the amount he had paid said Company. This action without a judicial determination abated upon his death, which occurred on the 3rd day of Febuary, A. D., 1871.

Hoffman brought suit to recover Premium.

Suit abated.

Died, Feb. 3d, 1871.

Appellant being the party in making the application, and to whom the Policy was to be issued—brings this action to enforce her contract and to recover the amount of that policy, with its interest from Feb. 3d, 1871, less any payments that were due the Company.

Appellant brings Suit.

Appellee defends chiefly upon the following grounds as we understand their answer.

Statement of grounds of Defence.

1st. That Goodwin was not the agent of the Company, and Thayer was not a general agent.

2d. That neither Thayer or Goodwin were authorized to receive payment in any thing but money.

3d. That Thayer did not receive the property.

4th. That Appellant is estopped by the action of her husband, the said Fredrick Hoffman, in bringing his suit to recover the premium.

Assignments of Error.

The Appellant believes and insists that the Court below erred

1st. In finding from the testimony that the Equity of the cause was with the Respondent.

2d. In ordering, adjudging, and decreeing that the Complainants bill stand dismissed with costs.

3d. In not granting a decree in favor of the Respondent.

Brief.

Propositions.

1st. Thayer at the time this application was taken was the General Agent of the Company for Ohio.

2d. A. C. Goodwin, was at that time a sub Agent of the Company, acting under Thayer, and was fully authorized to write up applications and to bind the Company by his acts.

3d. Thayer received the premium and took the property, and in this he was acting within the scope of his authority and bound the Company.

4th. If an agent is empowered by his company to write up applications, to receive premiums and to give binding receipts, if he takes his pay in anything besides money he nevertheless binds the company.

5th. The scope of an agent's power, acting for a Life Insurance Company is life, and whatever he does in the way of procuring Insurance on *Lives* binds his Company.

Argument.

Thayer was the General Agent of the Company.

Thayer a General Agent.

His commission from the Company reads, record, pages 55—56.

His Commission Record 55—56.

"The District to be assigned said party of the second part shall embrace the State of Ohio."

District.

And on page 54, it reads:

Record, 54.

"That the said party of the first part doth hereby appoint the said Justin E. Thayer, as agent of the said party of the first part, for the purpose of procuring and effecting assurance on the lives of Individuals, and securing applicants, therefor, who shall be satisfactory to the said Company and for the purpose of collecting and paying over premiums on assurance when effected."

His Powers.

Also on page 55:

Record, 55.

It empowers him "to appoint sub agents, and terminate such appointments." "And to appoint medical Examiners, subject to the approval of the company."

He is Empowered to appoint Sub Agents &c

In the Case of { Insurance Company, vs. Wilkinson.

13th. Wallace 223—233—234

13th. Wallace, 223—233—234.

This Court has declared substantially. "That a corporation can only act through its agents, and when it operates through an agent, that agent as to all parties dealing with the company through him stands in the place of the company, and whatever he does in the line of the business thus entrusted to him binds the company, as to those dealing with him, he is the company."

What this Court has Declared.

Now, Thayer was empowered to procure and effect insurance on the lives of individuals, with full powers of appointment and Renewal. While it may be true that he was not a general agent in the broadest sense, yet for Ohio, and to every one contracting with the company in Ohio, he was the General Agent of the Company.

Thayer for Ohio, was the Company.

But this matter is set at rest notwithstanding the answer of the company, by the deposition of the President of the com-

President of the Co., says Thayer was General Agent, Record, 45.

pany, records, page 45. He says: "The company was transacting business in the State of Ohio, during the year 1869. Justin E. Thayer, was the *General Agent* of this company in Cleveland, Ohio, during the year 1869, to procure and effect insurance on the lives of individuals and to collect and pay over premiums on such insurance when effected.

The Secretary says the President's statement is true.

And the deposition of George B. Sawyer, the Secretary of the company, says, that this statement of the President is true.

A. C. Goodwin, Agent.

Record, 54.

A. C. Goodwin, was a sub agent of the company, and was fully authorized to write up applications and to bind the company. But a short time prior to the taking of this application, the memorandum of the agreement between Goodwin and Thayer shows—record, page 54—as well as the testimony of Thayer and also that of Goodwin, show that Goodwin was employed by Thayer as an agent under himself, acting under his directions and his instructions, yet as an agent of the company duly appointed and sent out with power to effect insurance, to appoint for him sub agents and medical examiners. His commission was a roving one, but he was one of the necessary agents for working up the territory allotted to this General Agent.

His Commission was a roving one.

The Depositions of the President & Secretary say he was not an Agent.

The depositions of the President and Secretary say he was not an agent—if not, why not?

Was not Thayer empowered to appoint him?

Could he not appoint without calling upon the company?

His contract empowered him both to appoint and to remove without calling upon the company, and the company only asked that his appointment of medical examiners should be subject to the approval of the company. But the testimony shows that he did go forth as an agent, and the General Agent ratified his acts—more than this, it shows that your General Agent opened an account with him. That Goodwin's office was in the Agent's office, that until long after this application was written up he had no other place of business than the Agent's office, and the company held him out to the world as its agent in such a manner, certainly, as to lead the public to place confidence in him as the Agent of the company.

How could they be placed on their guard? The company had recognized him, its General Agent had gone with him to work up the business.

Had permitted him to do business behind his counters. Record, 35.

Had armed him with books, pamphlets, applications, and binding receipts. Record, 25.

The company had in this manner invited Fredrick Hoffman, to place confidence in him as its agent, and shall the company be permitted to deny his acts.

But the General Agent was cognizant of the whole matter. He went with Goodwin to talk with Hoffman, and to see the property, and the next day according to Goodwin's testimony, ordered or directed Goodwin to go and do exactly what he did do. Certainly Goodwin brought the application to the office and placed it in Thayer's hands, and the horse he placed in his hands—and the note and the due Bill were by Thayer charged up to Goodwin. Record. 22.

Goodwin's commissions on this Policy alone amounted to the snug little sum of $276.00, page 23, a greater sum than the Note and the due Bill amounted to, in view of these facts can it be said that Goodwin was not authorized to act for the company—and even admitting for the moment that Goodwin was not authorized—can it be said that the evidence does not clearly establish that this was the act of Thayer, the General Agent? Surely it was his act, sanctioned, directed, ratified and in every way acted upon. Record, 23, Goodwin's Commission $276.00. Assumes that the evidence show it was the act of Thayer.

Surely, Fredrick Hoffman acted upon it in good faith when he made that application for the benefit of Appellant, and in parting with his property and money.

Can the company be required to do less?

Before leaving this branch of the subject we wish to suggest another thought.

Thayer had an open account with Goodwin, opened as early as April, 1869, and after this transaction we find, page 42 of records, the same account is still open and their transactions, debtor and credit are entered therein as though he had never quit the employ of Thayer and of said company. Record, 42.

Thayer admits that he received and forwarded the application and in due time received the policy. Page 37. Record, 37—38

That he received the horse and daily used him. Page 38. Record, 38.

That he was willing to trade the horse for a lot, Page 40, and never thoutht of consulting Hoffman. Record, 40.

And all of these facts taken in connection with the positive

testimony of Goodwin—to our minds show conclusively that the whole transaction was Thayer's, the General Agent.

This brings us to the question, did those acts bind the company?

Insurance Co., vs. Wilkinson.

And we apprehend this question will be well answered, at least that we shall be well toward the answer, when we shall answer the question propounded by this Court in the Case of Insurance Company vs. Wilkinson. 13th. Wallace 234.

13th, Wallace, 234.

"Whose Agent was he"?

Do- 233.

And we think the language of the Court in that case, page 233, is very applicable here, the Court say; "It is in precisely such cases as this that Courts of law in modern times have introduced the doctrine of Equitable Estoples in *Pais*. The principle is that when one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against Equity and good conscience for him to assert, he would not in a Court of Justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by Courts of law as well as equity, when the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.

It has been applied to the precise class of cases of the one before us in numerous well considered judgments by the Courts of this Country. Indeed the doctrine is so well understood and so often enforced that if in the transaction we are now considering, Ball, the insurance agent, who made out the application had been in fact the underwriter of the policy no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball, was the agent of the Insurance company and not of the plaintiff, in what he did do in filling up the application the company must be held to stand just as he would if he were the principle"

Do. page.

Again, the Courts ays, the party taking out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite

true that the reports of judicial decisions are filled with the efforts of these companies by their counsel to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy. The argument being that as to all other acts of the agent he is the agent of the assured.

This proposition is not without support in some of the earlier decisions on the subject, and at a time when insurance companies waited for parties to come to them to seek insurance or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents which we have described, would be a snare and a delusion, leading as it has done in numerous instances to the grossest frauds, of which the insurance corporation receives the benefit, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this Country is steadily in the opposite direction. The powers of the agent are prima facia co-extensive with the business intrusted to his care. *And will not be narrowed by Limitations not communicated to the person with whom he deals.* An Insurance Company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principals.

The powers of th Agent are Co-Ex tensive with th business entruste to him.

Mr. Justice Crippen, says:

Masters vs. Madison County Alert Insurance Co. 11th. Barb. R. 624. "They employ their own agents and send them abroad in the community with their printed blanks and instructions. The business of these agents is to obtain insurances. The public know nothing of their bye-laws or instructions. They are regarded as the agents of the companies and confided in as being competent to transact the business entrusted to them accurately and according to law."

Justice Crippen says 11th, Barb R. 624.

May on Insurance, Sec. 143, page 145, has collated a large number of authorities, to the effect that companies are responsible for the acts of their agents—both of omission and commission, representations, statements and assurances—made within the scope of his agency, if relied upon by the assured who is himself without fault."

May on Ins. Sec 143, page. 145.

that is necessary to constitute a valid contract between the parties. If the assured die before the Policy is issued the contract so made is as available to sustain an action for the amount of the insurance as if the policy itself had been delivered.

We have thus far cited authorities showing how the courts have held in regard to this matter of agency and the scope of the agency.

Permit us also to give that defination which Webster has adopted.

pe: Webster's finition.

Scope, "The limit of intellectual view; the end or thing to which the mind directs its view; that which is purposed to be reached or accomplished; hence, ultimate design, aim, or purpose; intention, &c."

Now in view of the language of the Courts as quoted, can there be any difficulty in arriving at the conclusion that the agent who receives payment from the applicant either in money or notes or property or by a contract for work and labor, binds his principals to the fullest extent, and when he does an act or makes a representation by way of securing an application for a Policy, the act and the representation are fully within the scope of his authority.

The Agent is the only person authorized to act for the company. It must act through agents, and whoever acts for it is its agent.

In this case we find two persons authorized to act for the interests of the company, Thayer and Goodwin, both of them presumed to have the information necessary to act faithfully and according to law.

Goodwin receiving the application, taking Hoffman to the medical examiner, receiving the property and the note and giving this conditional receipt. For whom was he working? For the company. By whom authorized? Thayer. And Thayer went with him to examine the property. Was there anything to put Hoffman on his guard, any suggestion that Goodwin was not what he represented himself to be, the agent, or an agent?

On the contrary there was everything to show that he was an agent. Everything to cause Hoffman to place confidence in him.

He officed with Thayer.

He was armed with all necessary blanks.

He held himself out as an agent and Thayer knew it.

Thayer went with him to examine the property.

And in pursuance of the negotiations pending between them, Hoffman made his application and parted with his property, and when his note fell due he paid it.

It was not necessary that a policy should issue.

Hoffman's mind and this company had come to a perfect agreement, an agreement consummated on his part. So that when the company acting reasonably in the matter, should say the application was all right, he was insured, even though the policy never issued. But here the policy did issue, and Justin E. Thayer refused to deliver it to this Appellant.

Now what was his excuse. He says the premium was not paid.

That conditional receipt says it was. page, 2—3.

But Goodwin had no right to sign it.

Yes, but all which Goodwin received passed into Thayer's possession or to his account, who by receiving the property ratified Goodwin's acts, and if he received it and Hoffman acting in good faith parted with his property, then the company have received the benefit of this payment.

And if Thayer by his acts caused Hoffman to place his confidence in Goodwin as an agent of the company and as duly authorized, then Thayer is estopped from denying his power, and his appointment under the power confered upon him, and the company are estopped from denying this act of Thayer.

But we go farther and say inasmuch as Thayer employed Goodwin, and

Went to see the horse. - - Records, page 39—101

And ordered Goodwin, to take the note and the horse. - - - - " " 22—56

And received the horse and used him daily. - - - - - " " 22—102

And said to Hamilton, the premium is to come out of that horse. - - " " 19—

And undertook to trade him for a lot. " " 40—110

And offered to sell him back to Hoffman, for $250.00 - - " " 39—107

And said he would consent to the trade if he could be made whole. " " 33—89

And gave no information to Hoffman, in regard to the horse.

Never offered to return him.

That, therefore, whatever was done was the act of Thayer, and bound the company. We are bound to believe Goodwin when he says, whatever I did in this matter was done by Thayer's direction.

We argue, also, if Thayer had nothing in the horse, what was he trying to get out? Why did they ask for his consent, why not let them make the trade as they saw fit?

Why not have acted with common honesty and good faith?

Even at the time Hoffman called for his policy, why did not Thayer inform him that they could not and had not received his property? Why keep the horse and offer to sell him back for $250.00 and close the matter up?

If he had not received him, was it his to sell back?

Had he any control of the horse?

And yet in the eyes of Hoffman, and of the world, Thayer treated him as his own.

If Thayer received that property as his own the premium was nevertheless paid--and Thayer became the personal debtor of the company.

25th Conn 265 and 452.

25th. Conn.—265 and 542.

If Thayer has not done all things to the liking of the company. Appellant should not suffer by his acts.

There is a Broad principle in Equity.

That when one of two must suffer from the acts of the third person—that one should suffer who has placed the third person in a position to do the wrong.

It is argued by Counsel, that inasmuch as Fredrick Hoffman, commenced an action in the Court of Common Pleas of Cuyhoga County, against this Insurance Company, for the recovery of the amount paid by him, that thereby he rescinded the Contract.

Under the expansive or elastic system of pleading, and amendments under the Ohio Code,—the action brought by Hoffman, had he lived, might have been shaped into the only one he could maintain, to wit: an action for the specific performance of the contract which he had entered into with the company brought for the use and benefit of his wife. As it stood at the time of his decease nothing was determined, no judicial determination was had.

The only cause of complaint which at that time he could have, was, that he had done everything on his part to be done and performed, and the company had failed to comply on its part, had refused to give to Appellant the policy which he had provided for her.

He could make the contract for the benefit of his wife. She had such an interest in his life that she could waive the policy.

And it is a well settled rule of law that one person may make a promise to another for the benefit of a third, and that third person may maintain an action upon that promise.

Cumberland vs. Codrington.

3, J. C. R. 254.
4th. O. St. R. 353.
3rd. O. St. R. 549.

3 J. C. R. 254.
4th O. St. R. 353
3 O. St. R. 549.

But neither law nor equity gives to the third person and the promisee both a right of action.

It was not in the power of Hoffman, either to revoke or rescind his contract.

His wife could receive what was for her benefit, he had made this contract for her benefit, had paid the premium and nothing more remained for him to do. If the company refused to perform, she could compel them to perform, and we have seen that when the company passed upon the application and accepted the risk, whether they issued the policy or not, his life was insured for her benefit.

The parties to the contract then, were Appellant and the company, they agreeing with her to pay her the amount of this policy on his death, and she agreeing to pay the premium.

In the case of the Fraternal Mutual Life Insurance Company vs. Henrietta Applegate, 7th. O. S. R. 292.

Fraternal Life In Co., vs. Henrietta Applegate, 7. O. S R, 292.

Henry S. Applegate, the husband of Henrietta, had insured his life in that company for the benefit of his wife, the application was signed with her name, the policy was issued for $2000.00, afterwards the company hearing that Applegate was spitting blood, and believing a misrepresentation had been made by him in his application, procured Applegate to surrender the policy and to take a paid up policy for $500.00, after his death an action was brought by his widow, Henrietta, upon the policy and to recover of the company the amount of it.

In the plea of the company, was one which alleged, "that

the deceased procured the policy in the name of his wife and surrendered it afterward to the company in consideration of the supposed misrepresentation, and the issuing of a new policy upon his life, dated June 21, 1852, for the benefit of his representatives for five hundred dollars, without premium. To this plea the plaintiff demurred, and the Court sustained the demurr, and this is one of the errors assigned, and which came before the Supreme Court of that State for decision.

Judge Scott delivered the opinion of the Court, the full bench concurring. He says: The first question which arises in the case, is: Did the Court below err in sustaining the demur to the sixth plea? and says:

"The general law in relation to life insurances taken for the benefit of wives, provides that it shall be lawful for any married woman by herself and in her own name &c., from her separate property to cause to be insured for her sole use the life of her husband, etc. Swan's Statute 480. By the eighth section of the act incorporating this company, (49 O. L. 220) it is provided 'that policies of insurance may issue to any married woman in her name or in the name of a third person as trustee to cause to be insured for her *sole use* the life of her husband, and in case of her surviving him the amount shall be payable to her for her sole use and benefit free from any claims of creditors or representatives of her husband, provided the annual premium shall not exceed the sum of $150, unless paid from the private property of the wife.'

These provisions treat a married woman as a feme sole in respect to policies of insurance taken out in her name upon the life of her husband. Such policies become her separate property and are placed beyond ther each of her husband or his creditors. Henry S. Applegate, had therefor no legal right to control this policy, and the unauthorized surrender of it by him as set up in the sixth plea constituted no bar to the action, and the Demurrer was therefor properly sustained."

Statutes of Massachusets.

The following is the provision of the statutes of Massachusets, under which Appellee acts, in regard to insurance for the benefit of the wife.

"A Policy of insurance on the life of any person expressed to be for the benefit of any married woman whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently

of her *husband* or his creditors, or the person effecting the same or his creditors. A trustee may be appointed by the party obtaining the policy, or if no such appointment is made, then by the Judge of the Probate Court for the county in which the party for whose benefit said policy is made resides, to hold the interest of the married woman in said policy, or the proceeds thereof. When a policy is effected by any person on his own life or on the life of another, expressed to be for the benefit of such other or his represntative, or a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid with interest thereon shall inure to the benefit of his creditors.

A Policy of insurance on the life of any person duly assigned, transfered, or made payable to any married woman, or to any person in trust for her, or for her benefit; whether such transfer be made by her husband or other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors; *provided, however*, that if the premium on such policy is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid with interest thereon shall inure to the benefit of said creditors subject however to the statute of limitations."

Bliss, on Life Insurance, Section 317, says: "We apprehend the general rule to be, that a policy and the money to become due under it belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the persons procuring the insurance, by any act of his or hers by deed, or by will, to transfer to any other person the interest of the person named, the person designated in the policy is the proper person to receipt for and to sue for the money."

Bliss on Life Ins Section 317.

The law of Massachusets is equally explicit with the law of Ohio, and by either of them the conclusion is certain. Hoffman had no power to cancel or rescind.

But says the Appellee, Hoffman retained an interest, and by the terms of the policy this was payable to him in his life time, and on his decease to his wife. To this we answer, the policy as issued never came into the hands of Fredrick Hoff-

man or Appellant, and while we are not bound by what the company may have put in the policy, we are bound by the application which the company has received and accepted and that forms the contract on Appellant's side.

Record, 50 & 135.

Turning to it page 50—135 of the Records—We read:

1. Full name and residence of the person for whose benefit insurance is applied for; relationship to the insured. Henrietta Hoffman, Cleveland, Ohio, Wife, to revert to Fredrick Hoffman. in case of her death before his.

Then follow the usual questions, but nothing changing this condition of the contract and the whole is signed Henrietta Hoffman, Applicant.

We submit that the policy Appellant was entitled to, is not changed by the copy the company has set up in its answer.

If the premium has been paid, or any part of it, Appellant is entitled to the policy she or her husband paid for, and as to what that was, we must look at the application and that only.

The mistakes of the company cannot prejudice our Equities.

Even had the company passed over this policy to Hoffman, and he had received it, he could have had it corrected or Appellant could, as not being what she had paid for.

Then Hoffman's Suit, brought, wholly undetermined as it is, can have no effect to alter, cancel or rescind, that, over which he had no control.

The remaining question is: Could the company cancel or rescind the contract?

The power of the company to rescind a contract is limited to those cases where there is a failure to perform, where misrepresentations have been made, or to cases classed as hazardous, and which they would not have taken had the whole truth been known.

But in no case was it ever known that a company could rescind a policy until they had first placed the policy holder in as good a condition as he was before.

Now, if the premium was ever paid as we claim it was, either to the company or its Agents, then the company had no power to cancel until there had been a failure on the part of Appellant to pay, and not in any event until it had refunded the amount of the premium. It certainly is a strange way of rescinding for

the company to hold both the premium and the policy. Surely the company has little ground for its plea.

If Hoffman paid the premium, Appellant alone was the party who could rescind—and if he did not pay it then there was nothing to rescind.

We submit, that the facts and the law are with the Appellant, and Equity surely indicates that the decree of the Court below should be reversed and this Court rendering such a decree as the Court below should have rendered; will direct an account to be taken of the value of such a policy as the company should have issued, deducting such sums as Appellee would have been entitled to receive, and for such sum she should have a judgment under the Law of Massachusets in regard to life insurance. Record, page 56. The value of such a policy will be readily obtained. Record, 56.

In reply to the Brief of Appellee's Counsel. We suggest:

1st. That we cannot agree to the statement of facts set forth in their Brief, and insist that the record shows our statement correct.

2d. The only part of the argument to which we care to reply is that as to the rescinding of the contract by Fredrick Hoffman, in his life time.

We have already given our views upon the power existing in Fredrick Hoffman to rescind the contract entered into between himself, for his wife, and the company. It is now claimed by the attorneys for the Co., that the Policy shows that it was to enure to the benefit of Fredrick Hoffman during his life.

In reply to this we say Appellant is not bound by the Policy which the company did not place in her hands, but is bound by the application, and it—Record, 50—51—says that the Policy was to be issued for the benefit of Henrietta Hoffman, of Cleveland, Ohio, the wife of Fredrick Hoffman. And in case of her death before his was to revert to him. Record, 50–51.

And this application is signed by Her as the applicant. Records, page 52. Record, 52.

It is true the policy set out by the Defendant reads as Defendant's Attorneys quote.

But it is equally true that the application calls for a different one, and the Appellant is entitled to recover upon her contract.

And this being the true condition of the case, of course she

could not be bound by the action of Fredrick Hoffman in a matter where she was not a party.

But again, we say that a careful examination of the cases cited from the Ill. Reports, show, that they do not sustain the argument. Ohio has not the Common Law practice.

And under the Code, had Hoffman lived, he might, had he any right in the premises whatever, have changed his proceeding into the only one he could have maintained that is, an action for a specific performance—the case abated here by his death and without a judgment.

In all the cases cited, a judgment had been obtained, which was a bar to another action upon the ground of *Res Adjudicati*, this can not be said here, for nothing had been adjudicated in that action.

J. A. Garfield
of Counsel

UNITED STATES SUPREME COURT.

HENRIETTA HOFFMAN.

VS.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, OF BOSTON.

NO. 381.

BRIEF FOR INSURANCE COMPANY,

BY

WILLEY, TERRELL & SHERMAN,

CLEVELAND, O.

Supreme Court of the United States.

HENRIETTA HOFFMAN,
vs.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, OF BOSTON.
No. 381.

BRIEF FOR INSURANCE COMPANY.

This case comes into this Court on an appeal by the Complainant from the decree of the United States Circuit Court for the Northern District of Ohio.

A brief statement of the facts as claimed by us ought, perhaps, to precede what we have to say in respect of the case.

During the year 1869 the John Hancock Mutual Life Insurance Company, of Boston, was doing business at Cleveland, Ohio, having for its general agent there, Justin E. Thayer.

On the 7th day of August, 1869, Frederick Hoffman, having made an application for insurance on his life, to the amount of $8,000.00, (on what is known as the endowment plan, payable to himself in ten years, or, in case of his prior decease, to his wife, Henrietta Hoffman,) through one A. C. Goodwin, received from said Goodwin the conditional receipt shown upon pages 2 and 3 of the Record.

The premium of $922.59, which this receipt acknowledges to have been received by said Goodwin, was paid to said Goodwin in the manner following, to wit: a horse, valued at $400.00, a sixty-days' note for $100.00, the cancellation of a prior indebtedness from Goodwin to Hoffman of $53.57, and a premium note for $369.00.

At the time of this transaction the said Goodwin was not the agent of the said Insurance Company, nor a sub-agent of said Thayer, but was merely an insurance broker, engaged in soliciting applications for insurance, and selling them out to the highest bidder among the various Life Insurance Companies doing business at Cleveland.

The conditional receipt given by said Goodwin to said Hoffman, and the premium note alleged to have been signed by said Hoffman, were never delivered to said Goodwin by said Thayer, or by any other agent of said Company, but were abstracted by said Goodwin from the office of said Thayer without his knowledge or consent.

Thayer in no way acquiesced in, nor consented to the payment of the premium in the manner above set forth, but insisted from the first that the premium must be paid in money, except the portion covered by the usual premium note, before the policy could be delivered.

The application having been sent forward to the Company at Boston, a policy was forwarded by the Company to Thayer, to be delivered by him to Hoffman, upon the payment of the premium, the Company forwarding at the same time to Thayer a premium note, for the portion of the premium to be covered by note, to be signed by Hoffman.

Shortly after the policy arrived Hoffman appeared at the office of Thayer and demanded the policy, which Thayer refused to deliver, without the payment by Hoffman of the cash portion of the premium in money and the signing by him of the premium note. Unsuccessful negotiations looking toward a settlement were had, but the matter finally rested upon the refusal of Thayer to deliver the policy.

The horse etc., were appropriated by Goodwin and were never returned by him to Hoffman.

Goodwin having appropriated the property of Hoffman, and Thayer having refused to deliver the policy to him, on the 4th day of December, 1869, Hoffman commenced, in the Common Pleas Court of Cuyahoga County, Ohio, a suit against the Insurance Company, for the recovery of the premium, or in other words, for the value of the property appropriated, as was alleged, by Goodwin

and Thayer, said suit being founded, principally, upon said conditional receipt heretofore referred to. On the 23d day of December, 1869, the said Company filed an answer in said suit, denying that said Hoffman had ever advanced to it the amount of the premium, or had ever received from it said receipt; and denying also, that said Goodwin was its agent, or in any manner authorized to act for it. On the 21st day of January, 1870, said Hoffman filed a reply to said answer, whereby the issue was joined.

A trial was had in said suit in said Common Pleas Court on the 7th of February, 1870, and resulted in a verdict of the jury for the Company. A second trial was taken by Hoffman under the Ohio statutes authorizing the same, and another trial was had in November, 1870, which resulted in a verdict for Hoffman. A motion for a new trial was made by the Company, and upon the hearing thereof the verdict of the jury in favor of Hoffman was set aside by the Court, and a new trial was granted. While the case was thus pending Hoffman died, and the case was abated by his death at the February term, 1871, of said Common Pleas Court.

On the 25th day of November, 1871, Henrietta Hoffman, widow of said Frederick Hoffman, commenced this suit in the same Common Pleas Court, and it was duly removed to the United States Circuit Court by the Company.

At the January term, 1873, of said Circuit Court, the case was tried upon its merits, resulting in a decree for the Company, from which decree the Complainant now brings this appeal to this Court.

Whatever else may be said in respect to this case, it is evident from the foregoing statement that in the various forms in which its merits have been contested it has been pretty thoroughly litigated. To one at all conversant with the defense of insurance cases before juries, the mere fact of a verdict in favor of the Company upon the merits ought to be decisive. But when we add to this the fact that the Court promptly set aside the verdict of a second jury against us, and also the fact that the Circuit Court, upon a full hearing, decreed in our favor, it would seem safe to affirm that there is nothing in this case to warrant this Court, under the ordinary rules governing Appellate Courts, to set aside or reverse this decree.

There is here simply an issue of fact to be determined upon conflicting testimony. This issue has been again and again decided in our favor by tribunals having the witnesses before them, face to face. By every canon of decision, as well as by all the teachings of experience, he who has heard the evidence given, who has seen the faces and observed the demeanor of the witnesses during the heat of the trial, has, in the matter of deciding upon the credibility and weight of testimony, such an immense advantage over him who merely reads the transcript, that, except in certain extraordinary cases, this advantage in the means of judgment alone is entitled to control the decision.

In view of what has already been said we shall not go into any very extended discussion of the facts.

It is admitted—

First. That Hoffman never paid or tendered any portion of his premium in cash.

Second. That the policy was never delivered, by reason of the failure of Hoffman to pay the premium in cash.

But it is claimed by the Complainant—

First. That Goodwin was the duly authorized agent of the Company, and that he agreed to take this premium in the manner already detailed.

Second. That Thayer, the general agent, knew of and acquiesced in the agreement of Goodwin in respect to the premium, and, indeed, agreed to take the horse himself.

As to the agency of Goodwin, we beg leave to refer the Court to the following pages and folios of the Record:

Goodwin's testimony.	Rec. p. 21, fol. 54.
" "	Rec. p. 26, fol. 67.
Thayer's testimony.	Rec. pp. 29, 30, fol. 77.
" "	Rec. p. 37, fols. 99, 100.

This evidence establishes—

(a) That Goodwin was merely an insurance broker.

(b) That he was under no obligation to solicit applications for any company, and that when he had solicited an application he was at liberty to turn it over to any company he pleased. He merely had a standing offer of thirty per cent. commission from the John

Hancock Company. If he could get more from any other company he had the right to accept it.

Goodwin claimed in his evidence to have been acting prior to August 1st, 1869, under a written contract with Thayer. To this, there are several answers:

1ST. The application of Hoffman was not taken till August 7th, 1869, which was after Goodwin admits himself to have been merely a broker.

2D. The instrument claimed to be the contract was never signed by Goodwin, as appears from the face of it, and hence never became a contract.

Rec. p. 54, fols. 138½, 138¾.

3D. This instrument had simply been drawn up and signed by Thayer, ready to be executed and delivered if Goodwin, upon trial, proved satisfactory to Thayer. Goodwin was on trial from April 7th to June 7th, 1869, the instrument lying meanwhile in Thayer's desk. Goodwin not proving satisfactory, Thayer refused to make any contract with him, and Goodwin then stole the instrument out of Thayer's desk.

That this instrument was never delivered, see

Rec. p. 24, fol. 63.

MEM. The record should here read "contract" instead of "receipt," as it was evidently the contract which was referred to by the question.

See also Rec. p. 30, fol, 78.

That Goodwin stole the instrument out of Thayer's desk, see

Rec. p. 30, fol. 78.

" p. 28, fol. 72.

That Goodwin was on trial simply from April 7th to June 7th, 1869, see

Rec. p. 29, fol. 76.

That the conditional receipt which Goodwin delivered to Hoffman was abstracted from Thayer's desk, without his knowledge or authority, see

Rec. p. 30, fols. 79, 80.

Although Goodwin swears that Hoffman signed a premium note for $369.00, yet no such note was produced in evidence, and neither

Thayer, nor any other officer or agent of the Company, ever saw any such note; and Thayer swears that he never had any blank premium notes in his office, but that the Company always sent the premium note along with each policy, made out in the proper amount, which was done in this case, such note appearing on page 57 of the record, folio 146.

See Rec. pp. 30 and 31, folio 80, 81.

That the officers of the company, at its home office, knew nothing of Goodwin or of this transaction, see depositions of Sanger, President, and Ager, Secretary. Rec. pp. 45, 46, 47 and 48.

As to the acquiescence of Thayer in the arrangement of Goodwin, we beg leave to call the attention of the Court to the following portions of the Record:

Thayer's testimony, Rec. p. 31, fols. 81, 82, 83, 84.
" " " p. 32, fols. 85, 86, 87.
" " " p. 38, fol. 104.

This evidence shows that Thayer explicitly told Goodwin that as far as the Company was concerned the premium on this policy must be paid in money, and if Goodwin could take the horse and turn it into $400.00 in money, he had no objection to the raising of the premium in that way.

The testimony of Daniel Hamilton, Complainant's own witness, also shows that Thayer always maintained his position in respect to this premium, namely: that Goodwin must produce $400 from this horse before the policy could be delivered.

See Rec. p. 19, fol. 49.
" " p. 20, " 51.

Goodwin swears that Thayer agreed to take the horse in part payment of the premium, and told him to close it up in that way; but Thayer denies this.

See Rec. p. 31, fol. 82.
" " p. 32, " 85.
" " p. 33, " 88.

Daniel Hamilton also swears that Thayer refused to take the horse at any price.

See Rec. p. 19, fol. 49.
" " p. 20, " 51.

Goodwin swears that he turned the horse over to Thayer; not only does Thayer deny this, but Daniel Hamilton swears that the horse was put into his stable by Goodwin, and in Goodwin's name, and that Goodwin told him that he had taken the horse in payment of Hoffman's premium.

See Rec. pp. 18, 19, fols. 46, 47, 48.
" " p. 20. fol. 51.

The bill for the keeping of the horse was made out against Goodwin by Hamilton, and was presented by him to Thayer, at Goodwin's direction, and was paid by Thayer and charged by him to Goodwin.

See Rec. p. 21, fol. 52.
" " p. 33, fol. 89.

The horse was finally taken by Goodwin to Platt's stable to be kept until sold, and this was the last that Thayer ever saw or heard of it.

See Rec. p. 32, fols. 85, 86.
" " p. 41, fols. 112, 113.

That Thayer took this horse and tried him for the purpose of seeing whether he would buy him, and that he endeavored in various ways to enable Goodwin to make the money out of him is conceded; but all this is abundantly explained and is perfectly consistent with Thayer's oft repeated demand that the money must come before any delivery of the policy.

See Rec. p. 31, fols. 82, 83.
" " p. 33, fol. 89.

From this brief review of the evidence it must be apparent to the Court that this case hinged, as far as the facts were concerned, upon the absolutely contradictory evidence of Goodwin and Thayer,—Goodwin for the Complainant, Thayer for the Respondent.

This being so, there were several considerations which were decisive in favor of the Company.

1st.—The burden was on the Complainant.

2nd.—Goodwin was not only proven to be a thief, but in his examination he substantially admitted the accusation.

3rd.—The only outside witness, Hamilton, corroborated Thayer in saying that Thayer refused to take the horse at any price, and insisted that Goodwin must make the money out of it before any delivery of the policy.

4th.—The utter inability of anybody to explain why, if Thayer had consented to this whole arrangement and made it his own, he did not complete it and deliver the policy in accordance with it.

We submit in perfect confidence, therefore,

First—That Goodwin was in no way able to bind the Company by any such agreement as he is alleged to have made, and

Second—That Thayer in no way acquiesced in, or agreed to, the arrangement between Goodwin and Hoffman, but insisted always upon the payment, by Hoffman, of the cash portion of the premium in money.

The complainant's case necessarily failed when the Court below found these two points in our favor.

If the necessities of this case demanded it, we should hope to maintain that Thayer, the General Agent, neither had the authority to take, nor to bind the Company to take, anything but money, or its substantial equivalent, in payment of the cash portion of this premium.

As between Thayer and the Company this proposition must, of necessity, be conceded.

Not knowing the extent of the actual authority of an agent, how far have the public the right to assume that his authority extends?

It is not to be presumed that an applicant for insurance on his life is entirely ignorant of the principles on which life insurance is founded. Indeed it is a matter of general knowledge that the prompt payment of premiums in cash is essential to the very existence of a Life Insurance Company. Every man knows that losses are paid out of the accumulation of premiums, and the accretions arising from their judicious investment. They cannot be paid in horses, or cattle, or other species of property other than money. In dealing with an agent of an Insurance Company, therefore, persons

are chargeable with this general knowledge, and as a result thereof the extent to which the public may rely upon an agent's implied authority is limited by such knowledge.

"The rule is, as to the public, that the authority of a general agent may be regarded by them as measured by the *usual* extent of his general employment."

Parsons on Contracts, 4th Ed., vol. 1, p. 42.

"If a general agent exceed his authority the principal is bound, *provided the agent acted within the ordinary and usual scope of the business he was authorized to transact.*"

Ibid., pp. 40, 41.

Now it is beyond denial that not only *ordinarily* and *usually*, but *universally* and *necessarily*, the premium for life insurance is exacted and paid in cash, or its substantial equivalent.

By a substantial equivalent we mean what ordinarily by commercial usage is accepted as cash, viz: checks, drafts on banks, etc.

In the face of such a general and universal usage, made necessary by the very nature of the business, who shall say that an applicant for insurance can compel an Insurance Company to take cats and dogs in payment of premiums by force of an agreement to that effect with its agent.

It is in pursuance with the demands of *good faith* only, that the principal is held bound by the acts of his agent, in excess of his real authority. We submit that the demands of good faith are satisfied when the principal is held to such acts and agreements of the agent as are within the ordinary and usual scope of the business he is employed to transact; and that it would be a manifest violation of good faith to hold a principal to the agreement of an agent which is not only contrary to the custom and usage of such agencies, but which, if carried out, would, *pro tanto*, destroy the very existence of the Company; all of which must have been known to the person dealing with the agent, if he possessed the knowledge common to men of ordinary intelligence.

Feeling confident that this case will go off without the necessity of a decision upon this point, we shall not discuss it further.

Having now gone over the Record briefly upon the merits, we, in conclusion, desire to call the attention of the Court to what we consider an effectual bar to this action.

The answer sets up (Rec. p. 14, fol. 36), that Frederick Hoffman rescinded this contract of insurance, if any ever existed, during his lifetime, by bringing a suit in the Common Pleas Court of Cuyahoga County, O., for the recovery of the premium, or consideration.

The facts, pleadings, journal entries, etc., in the proceedings in said Common Pleas Court are fully shown on pages 58, 59, 60, 61, 62 and 63 of the Record, and have already been very fully set forth in the statement of facts which has preceded.

Upon these facts, which are undisputed, we submit the following propositions of law:

First. The bringing of a suit to recover back the consideration money after a breach of the contract, is equivalent to an express disaffirmance of the contract, and is to be regarded as sufficient evidence of the determination of the party to treat it as rescinded, as the consideration can only be recovered back on the ground of the disaffirmance of the contract.

Second. A specific performance of a contract will not be decreed where a party has treated it as rescinded, by suing to recover back the consideration paid upon the contract.

In support of these propositions of law, we beg leave to call the attention of the Court to the following authorities:

Herrington vs. Hubbard, 2 Ill. Rep., 569.

The facts of this case were substantially as follows: In February, 1835, Hubbard entered into an agreement with Herrington for the purchase of a certain tract of land, agreeing to pay therefor $500 down upon the delivery of the deed, and the balance, being $3,250, in certain deferred payments. Hubbard paid the $500 before any delivery of the deed by Herrington, and was ready and willing to pay the balance of the purchase money according to the agreement, but Herrington refused to perform the agreement upon his part, by executing and delivering a deed of the premises.

On the 2d of May, Hubbard sued Herrington in covenant to recover damages for the non-performance of the contract; and on

the 7th of May, Hubbard again sued Herrington in *assumpsit* for the recovery of the money which he had paid upon the contract.

Afterwards Hubbard brought his bill for specific performance.

In the course of its decision, the Court say, page 572:

"Whatever may have been the state of facts between the parties, as it regards the payment of the first installment, and the readiness of Hubbard to complete the others, after the time for the second payment had expired, there would seem to be no rational doubt that Hubbard had determined to treat the contract as rescinded by the acts of the parties, in their non-compliance to carry it into execution at the precise time stipulated."

"He first institutes his action of covenant to recover damages for the non-performance by Herrington of his portion of the agreement; and afterwards brings his action to recover back the consideration money paid. We think this is sufficient evidence of his determination to treat the contract as rescinded; and that it is equivalent to an express disaffirmance of it. Such must be the legal intendment of his act; for he certainly could not recover back the consideration money paid, but on the ground of a disaffirmance."

And again, page 573, the Court say:

"It was urged at bar, that Hubbard had concurrent remedies, that he might proceed at law and equity at the same time; though he could not obtain damages and enforce a specific performance, he might elect which remedy he would pursue, and which to abandon, after their institution. The doctrine of concurrent remedies is not disputed; but he surely could not proceed to recover back in an action at law the consideration money paid, which must be based on an actual or constructive disaffirmance of the contract and also obtain a decree for the specific execution of a contract, pronounced by a judgment at law, disaffirmed. The action for damages for the non-performance of the contract in covenant, and his remedy in equity, might probably have been proceeded in at the same time; and he might have elected which he would prosecute to final judgment; but most certainly the action in *assumpsit*, for the consideration money, cannot be ranked under the class of those termed elective."

Dalton et al. vs. Bentley, 15 Ill. Rep., 420.

We are unable to abridge the decision in this case, and shall ask the Court, if it becomes important, to give it a reading, as it covers only two pages of the volume.

It is sufficient to say here, that it holds that where one party to a contract has violated its provisions, the other party has a right to treat the contract as still subsisting, and bring his action upon

it for its violation, or to treat it as rescinded and bring his action for the recovery of the consideration paid; and that the one form of action is necessarily an affirmance of the contract, while the other is in itself conclusive evidence of the disaffirmance and rescission of it.

Smith vs. Smith, 19 Ill. Rep., 349.

The syllabus of this case sufficiently sets out the facts and the holding of the Court, and is as follows:

"Where a party filed his bill to enforce a contract made with his father, by which complainant was to support the father until his death, and in consideration was to have the farm of his father: but it appeared that after the death of the father he filed his claim against the estate of his father for his services, etc., and was allowed therefor: *Held*, that the claim against the father's estate for compensation, was a disaffirmance of the contract set up in the bill, and that the complainant was without equity."

Cooper vs. Brown et al., 2 McLean's Rep. (U. S. C. C.) 495.

This was an action of *assumpsit*, brought to recover back the consideration paid for certain lots of ground sold by the defendants to the plaintiff, and which they agreed to convey by a deed of general warranty, but which they failed to do.

The Court held that the action of *assumpsit* could not be maintained while the contract was open and subsisting, and that the mere bringing of the action in such a case was in itself a disaffirmance and rescission of the contract, there having been no other disaffirmance or rescission on the part of the vendee.

Certainly no comment of ours could add to the force of these decisions.

In the hearing of the case below, the only answer made, or attempted, to the above propositions and authorities, was, that while they would have been conclusive as between Frederick Hoffman and the Company, yet as between Henrietta Hoffman and the Company they have no application.

It was further said, that Henrietta Hoffman, having an interest in this policy, it was not in the power of Frederick Hoffman to rescind it without her consent.

It is a sufficient answer to these claims to say, that at the time

of the rescission of this contract by Frederick Hoffman, Henrietta Hoffman had no interest in this policy.

As has already been stated, and as will be seen from the record page 15, folios 37, 38, this policy was payable, ten years from date, to Frederick Hoffman himself, or, in case of his prior decease, to Henrietta Hoffman.

Any interest, therefore, which Henrietta Hoffman was to have in this policy was conditional and dependent upon the happening of a future named event. Before the happening of the event, and while the whole beneficial interest of the policy was in Frederick Hoffman, it was by him disaffirmed and rescinded. At the time of his death, therefore, there was nothing left of this contract or policy to pass to Henrietta Hoffman.

Although we regard this as a conclusive answer to the objections made by complainant, yet, were this an ordinary life policy running to Henrietta Hoffman, we should have no doubt that Frederick Hoffman, the insured, would have the power to surrender, cancel or rescind the policy without the consent of Henrietta Hoffman, the assured.

The consideration moving from the insured, it is substantially the contract of the insured, and, during his life, is practically and legally within his control.

Again, Frederick Hoffman in his lifetime having actually disaffirmed and rescinded this contract, and Henrietta Hoffman having made no objection thereto, and having neither paid nor tendered any premium thereafter, she is precluded from recovering thereon.

See *Isabella Williams, by next friend, vs. Washington Life Insurance Company*, 4 Bigelow Life and Acc. Ins. Rep. 56.

Our defense, then, rests upon these four propositions of law and fact:

First—That Goodwin was not an agent of the Company, nor authorized to bind it in the alleged arrangement in respect to the premium.

Second—That Thayer, the general agent, in no way acquiesced in or agreed to said arrangement, but insisted from first to last that the cash portion of the premium must be paid in money.

Third—That Thayer had no authority to take, or to bind the Company to take, the cash portion of this premium partly in a horse, and partly in the cancellation of an old indebtedness from Goodwin to Hoffman.

Fourth—That the prosecution by Hoffman of an action to recover back the consideration money paid was a disaffirmance and rescission of the contract, if any ever existed, and is an effectual bar to this suit.

Very Respectfully,

WILLEY, TERRELL & SHERMAN,
Solicitors for Respondent.

CLEVELAND, OHIO.